

FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

Vol. XI, No. 7

July 2010

FAC 2005-42 ADDRESSES DISCLOSURE OF NONCOMPETITIVE CONTRACT JUSTIFICATIONS, RECOVERY ACT

Federal Acquisition Circular (FAC) 2005-42 is a big hodgepodge with 11 rules: three finalize interim rules addressing Public Law 111-5, the American Recovery and Reinvestment Act (Recovery Act); three address Cost Accounting Standards and allowable costs; two address foreign acquisitions; and the other three address the Electronic Subcontracting Reporting System, market research, and public disclosure of justifications for noncompetitive contracts.

■ Recovery Act Whistleblower Protections:

This finalizes, with changes, the interim rule that implemented Section 1553 of the Recovery Act, which prohibits non-federal employers from discharging, demoting, or discriminating against an employee as a reprisal for disclosing evidence of gross mismanagement or waste of Recovery Act covered funds to certain categories of officials.

The interim rule, part of the Recovery Act rules in FAC 2005-32, added FAR 3.907 and the clause at FAR 52.203-15, both titled “Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Recovery Act).” In addition, FAR 52.203-15 requires contractors to post notice of employees’ rights and remedies for whistleblower protections. Two respondents submitted comments on the interim rule. Consequently, this final rule revises the interim rule as follows:

- The definition of “covered funds” in FAR 3.907-1, Definitions, is expanded from “Covered funds means funds appropriated by or otherwise made available by the Recovery Act” to “Covered funds means any contract payment, grant payment, or other payment received by a contractor if – (1) the federal government provides any portion of the money or property that is provided, requested, or demanded; and (2) at least some of the funds are appropriated or otherwise made available by the Recovery Act.” This revised definition more consistent with the statutory definition.
- FAR 52.203-15(b) is revised to require contractors to “include the substance of this clause, including this paragraph (b), in all subcontracts that are funded in whole or in part with Recovery Act funds.” The interim rule had required contractors to “include the substance of this clause including this paragraph (b) in all subcontracts.”

For more on the interim rule, see the April 2009 *Federal Contracts Perspective* article “FAC 2005-32 Implements Recovery Act.”

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■ **Publicizing Recovery Act Contract Actions:** This finalizes, with changes, the interim rule in FAC 2005-32 that added FAR Subpart 5.7, Publicizing Requirements Under the American Recovery and Reinvestment Act of 2009, to implement the unique requirements in the Office of Management and Budget (OMB) Memorandum M-09-10, “Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009,” for reporting actions that use Recovery Act funds.

OMB Memorandum M-09-10 required that the FAR be amended to reflect: (1) unique requirements for posting of presolicitation notices; (2) unique requirements for announcing contract awards; (3) unique requirements for entering awards into the Federal Procurement Data System (FPDS) (<https://www.fpds.gov>); and (4) unique requirements for actions that are not fixed-price or competitive.

Three respondents submitted comments on the interim rule. In response to these comments, paragraph (c) of FAR 5.704, Publicizing Preaward, and paragraph (a)(3) of FAR 5.705, Publicizing Postaward, are revised to remove the requirement that the contracting officer prepare “a narrative of the products and services (including construction) that is clear and unambiguous to the general public” and replace it with the requirement that the contracting officer “use clear and concise language to describe the planned procurement.”

Subsequent to the issuance of FAC 2005-32, OMB issued Memorandum M-09-15, “Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009,” which supplemented, amended, and clarified the initial guidance in M-09-10 (see Section 1.5 of Memorandum M-09-15 for a summary of the significant changes). To implement the M-09-15 changes, the following revisions are made:

- FAR 5.704(a)(2) is revised to clarify that modifications of orders are not required to be publicized at the preaward stage.
- FAR 5.704(b) is revised to require contracting officers to identify proposed contract actions, funded in whole or in part by the Recovery Act, by using the instructions in FAR 5.704(b) and that are available in the Recovery FAQs at FedBizOpps (<https://www.fbo.gov>).
- FAR 5.705(b) is revised to require contracting officers to include in the description of the contract action a statement specifically noting if the action was not awarded competitively, or was not fixed-price, or was neither competitive nor fixed-price.

For more on the interim rule, see the April 2009 *Federal Contracts Perspective* article “FAC 2005-32 Implements Recovery Act.” For more on OMB Memorandum M-09-10, see the March 2009 *Federal Contracts Perspective* article “\$787 Billion Stimulus Package Passed, Spending To Be ‘Transparent and Accountable’.”

■ **Access by Government Accountability Office (GAO)/Inspector General (IG) to Recovery Act Contracts and Subcontracts:** This finalizes, with minor changes, the interim rule that provided for the audit and review of contracts and subcontracts with Recovery Act funds by GAO and IG staff by adding alternate clauses to FAR 52.212-5, Contract Terms and Conditions

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

Required to Implement Statutes or Executive Orders – Commercial Items, FAR 52.214-26, Audit and Records – Sealed Bidding, and FAR 52.215-2, Audit and Records – Negotiation. Also, the interim rule amended paragraph (a)(7) of FAR 12.504, Applicability of Certain Laws to Subcontracts for the Acquisition of Commercial Items, to apply 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, to commercial item subcontracts using Recovery Act funds (these statutory provisions do not otherwise apply to subcontractors when they are not required to provide cost or pricing data).

Comments on the interim rule were submitted by five respondents. In response to the comments, the clause prescriptions in paragraph (b)(4)(ii) of FAR 12.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items (for FAR 52.212-5), paragraph (a)(2) of FAR 14.201-7, Contract Clauses (for FAR 52.214-26), and paragraph (b)(2) of FAR 15.209, Solicitation Provisions and Contract Clauses (for FAR 52.215-2), are amended to clarify the application of the clauses to supplemental agreements and orders under task- and delivery-order contracts, using Recovery Act funds.

For more on the interim rule, see April 2009 *Federal Contracts Perspective* article “FAC 2005-32 Implements Recovery Act.”

■ **Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns:** This interim rule revises FAR 52.230-4, Disclosure and Consistency of Cost Accounting Practices – Foreign Concerns, and its prescription at FAR 30.201-4, Contract Clauses [regarding Cost Accounting Standards (CAS)], to reflect changes made in the CAS Board clause “Disclosure and Consistency of Cost Accounting Practices – Foreign Concerns.”

On March 26, 2008, the CAS Board required the use of a new clause “Disclosure and Consistency of Cost Accounting Practices – Foreign Concerns,” in CAS-covered contracts and subcontracts awarded to foreign concerns. This clause, at paragraph (f) of CAS 9903.201-4, Contract Clauses, was adopted because the clause previously used, CAS 9903.201-4(c), Disclosure and Consistency of Cost Accounting Practices, had to be modified whenever it was included in contracts and subcontracts with foreign firms to reflect the different CAS applicable to foreign firms. Therefore, to maintain consistency between the CAS and FAR in matters relating to the administration of CAS, the FAR is amended as follows:

- To FAR 30.201-4(c), the prescription for use of FAR 52.230-4, is added (c)(2), which states, “The clause at 52.230-4 requires the contractor to comply with 48 CFR 9904.401 [Cost Accounting Standard – Consistency in Estimating, Accumulating and Reporting Costs] and 48 CFR 9904.402 [Cost Accounting Standard – Consistency in Allocating Costs Incurred for the Same Purpose] to disclose (if it meets certain requirements) actual cost accounting practices, and to follow consistently its disclosed and established cost accounting practices.”
- FAR 52.230-4 is replaced in its entirety to reflect the amendments adopted by the CAS Board on March 26, 2008.
- FAR 52.230-6, Administration of Cost Accounting Standards, is revised to include references to FAR 52.230-4 where appropriate.

Comments on this interim rule must be submitted no later than August 16, 2010, identified as “FAC 2005-42, FAR Case 2009-025,” 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.

For more on the CAS clause, see the April 2008 *Federal Contracts Perspective* article “New CAS Clause for Contracts with Foreign Concerns.”

■ **Compensation for Personal Services:** This interim rule revises paragraphs (q)(2)(i) and deletes paragraph (q)(2)(ii) of FAR 31.205-6, Compensation for Personal Services, to bring (q)(2) into conformance with the changes made by the CAS Board to CAS 412, Cost Accounting Standard for Composition and Measurement of Pension Cost, and CAS 415, Accounting for the Cost of Deferred Compensation.

The CAS Board specified that the accounting of Employee Stock Ownership Plan (ESOP) costs, regardless of type, would be covered by the provisions of CAS 415 only and not by CAS 412. The CAS Board also provided criteria in CAS 415 for measuring ESOP costs and assigning these costs to cost accounting periods.

To bring FAR 31.205-6(q)(2) into conformance with the CAS Board changes, the following changes are made:

- FAR 31.205-6(q)(2)(i) is deleted in its entirety (it addressed when ESOPs were to be covered by CAS 412), and FAR 31.205-6(q)(2)(ii) through (vi) are redesignated as paragraphs FAR 31.205-6(q)(2)(i) through (v).
- Redesignated FAR 31.205-6(q)(2)(i) is revised by deleting “For ESOPs that do not meet the definition of a pension plan at [FAR] 31.001 [Definitions]...”, so all that remains is “the contractor measures, assigns, and allocates costs in accordance with 48 CFR 9904.415.”

Comments on this interim rule must be submitted no later than August 16, 2010, identified as “FAC 2005-42, FAR Case 2009-026,” 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.

For more on the CAS Board changes, see the June 2008 *Federal Contracts Perspective* article “CAS Address Costs for Contractors’ ESOPs.”

■ **Payrolls and Basic Records:** This interim rule amends FAR 52.222-8, Payrolls and Basic Records, to remove the requirement to submit complete social security numbers and home addresses of individual workers in weekly payroll submissions under construction contracts.

The Department of Labor (DOL) decided that it is not necessary for contractors and subcontractors to submit workers’ social security numbers and home addresses when reporting weekly payrolls, so it revised its regulations to reflect this.

To bring FAR 52.222-8 into conformance with the DOL changes, FAR 52.222-8(b)(1) is revised to delete the requirement for submission of full social security numbers and home addresses of individual workers from the prime contractor on weekly transmittals. Instead, the payrolls only need to include an individually identifying number for each employee (e.g., the last four digits of the employee’s social security number). The information may be submitted in any form desired, but a link is provided to the DOL’s Wage and Hour Division website where Optional Form WH-347, Payroll (For Contractor’s Optional Use), is available (<http://www.dol.gov/whd/forms/wh347.pdf>). Finally, the revised paragraph requires contractors and subcontractors to maintain the full social security number and current address of each covered

worker, and to provide them upon request to the contracting officer, the contractor, or the Wage and Hour Division for purposes of an investigation or audit of compliance with prevailing wage requirements.

Comments on this interim rule must be submitted no later than August 16, 2010, identified as “FAC 2005-42, FAR Case 2009-018,” 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.

■ **New Designated Country – Taiwan:** This finalizes, without change, the interim rule that added Taiwan (known in the World Trade Organization as “the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)”) to the list of World Trade Organization Government Procurement Agreement countries in the following portions of the FAR:

- Paragraph (b)(4) of FAR 22.1503, Procedures for Acquiring End Products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor
- Paragraph (1) of the definition of “designated country” in FAR 25.003, Definitions
- Paragraph (a)(4) of FAR 52.222-19, Child Labor – Cooperation with Authorities and Remedies
- Paragraph (a)(1) of FAR 52.225-5, Trade Agreements
- Paragraph (1) of the definition of “designated country” in paragraph (a) of FAR 52.225-11, Buy American Act – Construction Materials under Trade Agreements
- Paragraph (1) of the definition of “Recovery Act designated country” in paragraph (a) of FAR 52.225-23, Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials Under Trade Agreements

This allows contracting officers to purchase goods and services made in Taiwan without application of the Buy American Act if the acquisition is covered by the World Trade Organization Agreement on Government Procurement.

No comments were submitted on the interim rule, so it finalizes the interim rule without change. For more on the interim rule, see the September 2009 *Federal Contracts Perspective* article “FAC 2005-36 Tidies Up Some Loose Ends.”

In a related note, the Department of Defense finalized, without change, the interim rule that added Taiwan as a “designated country” to the list of World Trade Organization Government Procurement Agreement countries in paragraph (a)(3)(i) of Defense FAR Supplement (DFARS) 252.225-7021, Trade Agreements, and in the definition of “designated country” in paragraph (a) of DFARS 252.225-7045, Balance of Payments Program – Construction Material Under Trade Agreements. One respondent submitted comments on the interim rule, but because the comments were outside the scope of the rule, the interim rule is finalized without change.

For more on the interim rule, see the December 2009 *Federal Contracts Perspective* article “DOD Ties Up Some Loose Ends.” Also, see the next article for more changes to the DFARS.

■ **Nonavailable Articles:** This finalizes, without change, the proposed rule that would amend paragraph (a) of FAR 25.104, Nonavailable Articles, to add “yeast, active dry and instant active dry”, and “pineapple, canned,” to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality. Also, the proposed rule would correct “modacrylic fur ruff” to “modacrylic fiber.”

Finally, as required by FAR 25.104(b), the entire list of nonavailable articles was published for public comment.

The Buy American Act does not apply to the acquisition of nonavailable articles as end items, and the contracting officer may treat foreign components of the same class or kind as domestic components.

The inclusion of an item on the list does not necessarily mean that there is no domestic source for the item, but that domestic sources can only meet 50% or less of total U.S. government and nongovernment demand.

No comments were received on the proposed changes or any of the articles on the entire list, so the proposed rule is adopted as final, and no further changes are made to the list of nonavailable articles.

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

■ **Electronic Subcontracting Reporting System (eSRS):** This finalizes, with changes, the interim rule that amended FAR Subpart 19.7, The Small Business Subcontracting Program, and the corresponding clause FAR 52.219-9, Small Business Subcontracting Plan, to require that small business subcontract reports be submitted using the Electronic Subcontracting Reporting System (eSRS) (<http://www.esrs.gov>), rather than SF 294, Subcontract Report for Individual Contracts, and SF 295, Summary Subcontract Report, both of which were deleted by the interim rule.

Nineteen respondents submitted comments on the interim rule. In response to the comments, the following changes are made in the final rule:

- The second sentence in paragraph (h) of FAR 19.705-6, Postaward Responsibilities of the Contracting Officer, is clarified by changing it from “The report shall be rejected if it is not adequately completed” to “The report shall be rejected if it is not adequately completed, for instance, if there are errors, omissions, or incomplete data.”
- Paragraph (d)(10)(iii) of FAR 52.219-9, Small Business Subcontracting Plan, is revised to clarify that awards to Alaska Native Corporations (ANCs) and Indian Tribes are to be reported as awards to small business and small disadvantaged business concerns, even if they are not small businesses or not certified by the Small Business Administration (SBA) as small disadvantaged businesses.
- Alternate III is added to FAR 52.219-9 for use when the contract action will not be reported in the Federal Procurement Data System (FPDS) in accordance with paragraph (c)(5) of FAR 4.606, Reporting Data (for example, when reporting of the information would compromise national security). In these instances, the contractor will need to use the SF 294 to submit an Individual Subcontract Report (ISR) instead of submitting an ISR in eSRS. To make this possible, SF 294 is added back to the FAR (see FAR 53.301-294, Subcontracting Report for Individual Contracts).

For more on the interim rule, see the May 2008 *Federal Contracts Perspective* article “FAC 2005-25 Requires Tax Delinquency Reporting, Mandates Use of Electronic Subcontract Reporting.”

■ **Additional Requirements for Market Research:** This interim rule implements Section 826 the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181), which requires agencies to: (1) conduct market research appropriate to the circumstances before awarding a task or delivery order in excess of the simplified acquisition threshold (\$100,000), and (2) ensure that any contractor with a contract over \$5 million for the procurement of items other than commercial items, and under which the contractor is acting as a purchasing agent for the government with respect to a purchase that exceeds the simplified acquisition threshold, engages in market research.

To implement Section 826, the following changes are made to the FAR:

- Paragraph (a)(2)(v) of FAR 10.001, Policy [for market research], is added to direct the contracting officer to conduct market research “before awarding a task or delivery order under an indefinite-delivery-indefinite-quantity (ID/IQ) contract...for a noncommercial item in excess of the simplified acquisition threshold.”
- FAR 10.001(d) is added to direct contracting officers to the requirements added as paragraph (a)(2) of FAR 44.402, Policy Requirements [for subcontracts for commercial items and commercial components], and Alternate I of FAR 52.244-6, Subcontracts for Commercial Items, that a contractor perform market research in contracts exceeding \$5 million for the procurement of items other than commercial items to determine “(1) if commercial items or, to the extent commercial items suitable to meet the agency’s needs are not available, nondevelopmental items are available that (i) meet the agency’s requirements; (ii) could be modified to meet the agency’s requirements; or (iii) could meet the agency’s requirements if those requirements were modified to a reasonable extent; and (2) the extent to which commercial items or nondevelopmental items could be incorporated at the component level.”
- Paragraph (b)(1) of FAR 10.002, Procedures, is amended to allow the contracting officer to “use market research conducted within 18 months before the award of any task or delivery order if the information is still current, accurate, and relevant.”
- FAR 44.402(b) and Alternate I of FAR 52.244-6 are added to require that contractors perform market research in contracts exceeding \$5 million for the procurement of items other than commercial items to determine “(1) if commercial items or, to the extent commercial items suitable to meet the agency’s needs are not available, nondevelopmental items are available that (i) meet the agency’s requirements; (ii) could be modified to meet the agency’s requirements; or (iii) could meet the agency’s requirements if those requirements were modified to a reasonable extent; and (2) the extent to which commercial items or nondevelopmental items could be incorporated at the component level.”

Comments on this interim rule must be submitted no later than August 16, 2010, identified as “FAC 2005-42, FAR Case 2008-007,” 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.

■ **Public Disclosure of Justification and Approval Documents for Noncompetitive**

Contracts: This finalizes, with changes, the interim rule that amended FAR 6.305, Availability of the Justification, to require agencies to post all justifications and approvals (J&As) for acquisitions conducted under other than full and open competition on FedBizOpps (<https://www.fbo.gov>) and their own websites within 14 days after contract award (30 days after contract award for acquisitions conducted under FAR 6.302-2, Unusual and Compelling Urgency).

Nine respondents submitted comments on the interim rule. In response to the comments, the following changes are made in the final rule:

- FAR 6.305, Availability of the Justification, is revised as follows:
 - Paragraph (c) is added to require that brand name justifications be posted with the solicitation. (Paragraph (c) of the interim rule has been moved to paragraph (e) – see below.)
 - Paragraph (d)(3) is added to require that justifications remain posted for a minimum of 30 days. (Paragraph (a)(1) and (a)(2) of the interim rule have been moved to paragraph (d)(1) and (d)(2).)
 - Paragraph (e) is added. The first half consists of paragraph (c) of the interim rule (“Contracting officers shall carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection”). The new second half provides “if the justification appears to contain proprietary data, the contracting officer should provide the contractor that submitted the information an opportunity to review the justification for proprietary data, before making the justification available for public inspection, redacted as necessary. This process must not prevent or delay the posting of the justification in accordance with the timeframes required in paragraphs (a) through (c).”
 - Paragraph (f) is added, and it states that the justification publication requirements, “do not apply if posting the justification would disclose the executive agency's needs and disclosure of such needs would compromise national security or create other security risks.”
- Paragraph (a)(1)(iii) is added to FAR 13.501, Special Documentation Requirements, to require that sole source justifications for actions conducted under FAR Subpart 13.5, Test Program for Certain Commercial Items, be published within 14 days after contract award; and paragraph (a)(1)(iv) is added to require that brand name justifications be made available with the solicitation.

For more on the interim rule, see the February 2009 *Federal Contracts Perspective* article “Publication of Justifications Required For Noncompetitive Contracts.”

A PLETHORA OF CHANGES TO DFARS IN JUNE

The Department of Defense (DOD) was very busy during June. Besides finalizing the interim rule that added Taiwan as a “designated country” to the list of World Trade Organization Government Procurement Agreement countries in the Defense FAR Supplement (DFARS) (see the previous article), it issued four other final rules amending the DFARS, five interim rules, two proposed rules, one FAR class deviation, and four memoranda providing guidance, instruction, and directions on DOD acquisition-related matters.

■ **Public Interest Exception to the Buy American Act for Finland:** This final rule amends paragraph (a) of DFARS 225.872-1, General, to add Finland to the list of qualifying countries, which means that Finland has entered into “a reciprocal defense procurement memorandum of understanding [RDP MOU] or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country.”

The RDP MOU provides that, in relation to defense procurement, each country will accord to the industries of the other country treatment no less favorable than that accorded to its own industries, to the extent consistent with its laws, regulations, and international obligations. With the new RDP MOU in place, the Secretary of Defense has determined that it is inconsistent with the public interest to apply the restrictions of the Buy American Act or the Balance of Payments Act to the acquisition of articles, materials, and supplies produced or manufactured in Finland. Therefore, Finland is added to the list of “qualifying countries.” In addition, paragraph (b) is amended to remove Finland from the list of countries for which the application of the Buy American Act or the Balance of Payments Act must be made on a purchase-by-purchase basis (the only country left on the list is Austria).

■ **Para-Aramid Fibers and Yarns Manufactured in a Qualifying Country:** This finalizes, with changes, the interim rule that implemented a determination made by the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) authorizing DOD to acquire articles containing para-aramid fibers and yarns manufactured in qualifying countries (that is, foreign countries that have entered into a RDP MOU with the United States).

In 1999, the USD(Acquisition & Technology) waived the restriction for para-aramid fibers and yarns manufactured in the Netherlands. On August 15, 2008, the USD(AT&L) expanded the existing waiver to permit the acquisition of para-aramid fibers and yarns manufactured in any qualifying country. On December 18, 2008, an interim rule was implemented making this change.

Nine respondents submitted comments on the interim rule, and the final rule differs from the interim rule as follows:

- The definition of “qualifying country” in paragraph (10) of DFARS 225.003, Definitions, and paragraph (a)(3) of DFARS 252.225-7012, Preference for Certain Domestic Commodities, is changed from “a country with a memorandum of understanding or international agreement with the United States” to “a country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country...”
- The items in paragraph (m)(2) of DFARS 225.7002-2, Exceptions, and paragraph (c)(6)(ii) of DFARS 252.225-7012, which are exempt from the restrictions of the Berry

Amendment (DFARS 225.7002-1, Restrictions), are revised from “the fibers and yarns are para-aramid fibers and yarns manufactured in a qualifying country” to “the fibers and yarns are para-aramid fibers and continuous filament para-aramid yarns manufactured in a qualifying country.”

For more on the interim rule, see the January 2009 *Federal Contracts Perspective* article “USD(AT&L) Permits Certain Foreign Products.”

■ **Letter Contract Definitization Schedule:** This finalizes, without change, the proposed rule that would amend DFARS 216.603-2, Application, to clarify that definitization schedules for letter contracts shall be established in accordance with the requirements at paragraph (a) of DFARS 217.7404-3, Policy [on undefinitized contract actions], instead of paragraph (c)(3) of FAR 16.603-2, Application.

No comments were submitted in response to the proposed rule, so it is finalized without change. For more on the proposed rule, see the August 2009 *Federal Contracts Perspective* article “Tidal Wave of DFARS Changes in July.”

■ **Ground and Flight Risk Clause:** This finalizes, with changes, the proposed rule that would combine DFARS 252.228-7001, Ground and Flight Risk, which was used in negotiated fixed-price contracts involving the furnishing of aircraft to the government, and DFARS 252.228-7002, Aircraft Flight Risk, which was used in cost-reimbursement contracts involving the furnishing of aircraft to the government, into a single clause that would apply to all contract types.

Three respondents submitted comments on the proposed rule, and the following changes have been made to the final rule:

- The exception in paragraph (b)(1)(ii) of DFARS 228.370, Additional Clauses, to the use of DFARS 252.228-7001 in “all solicitations and contracts for the acquisition, development, production, modification, maintenance, repair, flight, or overhaul of aircraft” is revised from “except those solicitations and contracts that use FAR Part 12 [Acquisition of Commercial Items] procedures and are for the development or production of aircraft” to “except those solicitations and contracts that are awarded under FAR Part 12 procedures and are for the *acquisition, development, production, modification, maintenance, repair, flight, or overhaul of aircraft; or otherwise involving the furnishing of aircraft...*” (emphasis added).
- The following new exception in DFARS 228.370 to the use of DFARS 252.228-7001 is added as paragraph (b)(1)(iv): “For commercial derivative aircraft that are to be maintained to Federal Aviation Administration (FAA) airworthiness when the work will be performed at a licensed FAA repair station.”
- To clarify DFARS 252.228-7001(f), which addresses the “contractor’s share of loss and contractor’s deductible under the government’s self-insurance,” the phrase in paragraph (f)(1) “that share is the lesser of...(ii) Twenty percent of the estimated price or cost of this contract” is revised to “Twenty percent of the price or estimated cost of this contract.” In addition, the following is added as paragraph (f)(4): “For task order and delivery order contracts, the contractor’s share of the loss shall be the lesser of \$100,000 or twenty percent of the combined total price or total estimated cost of those orders

issued to date to which the clause applies” (proposed paragraph (f)(4) is redesignated as paragraph (f)(5)).

- To DFARS 252.228-7001 is added paragraph (1), which addresses “government acceptance of liability”: “To the extent the government has accepted such liability under other provisions of this contract, the contractor shall not be reimbursed for liability to third persons for loss or damage to property or for death or bodily injury caused by aircraft during flight unless the flight crew members previously have been approved for this flight in writing by the Government Flight Representative, who has been authorized in accordance with the combined regulation entitled ‘Contractor's Flight and Ground Operations’.”

For more on the proposed rule, see the January 2008 *Federal Contracts Perspective* article “Patent Rights Clause Added to DFARS.”

■ **Trade Agreement Thresholds:** This interim rule amends the prescriptions at DFARS 225.1101, Acquisition of Supplies, and DFARS 225.7503, Contract Clauses, to reflect the increased thresholds for application of the trade agreements. Every two years, the trade agreements thresholds are escalated according to a pre-determined formula set forth in the agreements. The United States Trade Representative specified the new thresholds on December 29, 2009 (see the January 2010 *Federal Contracts Perspective* article “Thresholds for Trade Agreements Adjusted”).

To bring the DFARS trade agreement thresholds into conformance with the new thresholds, the following changes are made:

- DFARS 225.1101 is amended by removing “\$194,000” and replacing it with “\$203,000” in paragraph (11)(i) introductory text; and by removing “\$67,826” and replacing it with “\$70,079” in paragraphs (11)(i)(A) and (11)(i)(B).
- DFARS 225.7503 is amended by removing “\$7,443,000” and replacing it with “\$7,804,000” in paragraph (a); by removing “\$7,443,000” and replacing it with “\$7,804,000” in paragraph (b); and by removing “\$8,817,449” and replacing it with “\$9,110,318” in paragraph (b).

Comments on the interim rule must be submitted no later than August 9, 2010, identified as “DFARS Case 2008-D040,” 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.

■ **Contract Authority for Advanced Component Development or Prototype Units:** This interim rule implements Section 819 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84), which places limitations on certain types of line items and contract options that may be included in contracts initially awarded through competitive solicitations. Section 819 is intended to prevent a contract for new technology that is initially awarded as a result of competition from becoming a noncompetitive effort for the development of advanced components or the procurement of prototype units. To implement Section 819, the interim rule adds DFARS 234.005-1, Competition, which states the following:

“A contract that is initially awarded from the competitive selection of a proposal resulting from a general solicitation may contain a contract line item or contract option for the provision of advanced component development or prototype of technology developed under the contract or the delivery of initial or additional prototype items if the item or a prototype thereof is created as the result of work performed under the contract only when it adheres to the following limitations:

- “(i) The contract line item or contract option shall be limited to the minimal amount of initial or additional prototype items that will allow for timely competitive solicitation and award of a follow-on development or production contract for those items.
- “(ii) The term of the contract line item or contract option shall be for not more than 12 months.
- “(iii) The dollar value of the work to be performed pursuant to the contract line item or contract option shall not exceed the lesser of: (A) the amount that is three times the dollar value of the work previously performed under the contract; or (B) \$20 million.”

A contract line item or contract option may not be exercised under this authority after September 30, 2014.

Comments on the interim rule must be submitted no later than August 9, 2010, identified as “DFARS Case 2009-D034,” 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: Meredith Murphy, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060.

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.”

■ **Limitations on Procurements with Non-Defense Agencies:** This interim rule implements Section 806 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84), which amended the limitations placed on procurements by non-DOD agencies by exempting such procurements that are: (a) entered into by a non-DOD agency that is an element of the intelligence community; and (b) when the procurement is for the performance of a joint program conducted to meet the needs of DOD and the non-DOD agency.

To implement Section 806, this interim rule amends DFARS Subpart 217.78, Contracts or Delivery Orders Issued by a Non-DOD Agency, as follows:

- To DFARS 217.7801, Definitions, is added the following definition of “non-DOD agency that is an element of the intelligence community”: “the Office of the Director of National Intelligence; the Central Intelligence Agency; the intelligence elements of the Federal Bureau of Investigation; the intelligence elements of the Department of Energy; the Bureau of Intelligence and Research of the Department of State; the Office of Intelligence and Analysis of the Department of the Treasury; and the elements of the Department of Homeland Security concerned with the analysis of intelligence information, including the Office of Intelligence of the Coast Guard.”
- Paragraph (a)(3) is added to DFARS 217.7802, Policy, to exclude “non-DOD agencies that are an element of the intelligence community” from the requirements of paragraphs (a)(1) and (a)(2) when the procurement is for performance of a joint program conducted to meet the needs of DOD and the non-DOD agency.

Comments on the interim rule must be submitted no later than August 9, 2010, identified as “DFARS Case 2009-D027,” 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: Meredith Murphy, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060.

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.”

■ **Multiyear Contract Authority for Electricity from Renewable Energy Sources:** This interim rule adds DFARS 217.175, Multiyear Contracts for Electricity from Renewable Energy Sources, to implement Section 828 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181), which authorizes DOD to enter into contracts for a period not to exceed 10 years for the purchase of electricity from sources of renewable energy.

DFARS 217.175 states that DOD may exercise this authority to enter into a contract for a period in excess of five years only if the head of the contracting activity determines, on the basis of a business case analysis prepared by DOD, that (1) the proposed purchase of electricity under such contract is cost effective; and (2) it would not be possible to purchase electricity from the source in an economical manner without the use of a contract for a period in excess of five years.

Comments on the interim rule must be submitted no later than August 9, 2010, identified as “DFARS Case 2009-D027,” 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.

For more on the acquisition-related provisions of Public Law 110-181, see the February 2008 *Federal Contracts Perspective* article “Defense Authorization Act Restricts A-76 Competitions, Extends FAR Subpart 13.5.”

■ **Ownership or Control by a Foreign Government:** This interim rule implement revisions to DOD Directive-Type Memorandum (DTM) 09-019, “Policy Guidance for Foreign Ownership, Control, or Influence (FOCI),” which revises the description of communications security material that is “proscribed information.” This requires conforming changes to paragraph (g)(ii)(B) of DFARS 209.104-1, General Standards, to reflect that the responsible office is the Security Directorate, Office of the Deputy Under Secretary of Defense, Human Intelligence, Counterintelligence, and Security. In addition, paragraph (a)(4)(ii) of DFARS 252.209-7002, Disclosure of Ownership or Control by a Foreign Government, is revised to reflect changes to the description of communication security material that is “proscribed information”: “Communications security (COMSEC) material, excluding controlled cryptographic items when unkeyed or utilized with unclassified keys.”

Comments on the interim rule must be submitted no later than August 23, 2010, identified as “DFARS Case 2010-D010,” 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.

■ **Balance of Payments Program Exemption for Commercial Information Technology – Construction Material:** This proposed rule would amend DFARS 252.225-7044, Balance of Payments Program – Construction Material, and DFARS 252.225-7045, Balance of Payments

Program – Construction Material under Trade Agreements, to implement the exemption from the Balance of Payments Program for construction material that is commercial information technology.

This exemption was added as paragraph (a)(2)(vi) to DFARS 225.7501, Policy [for Balance of Payments Program], to correspond to the exemption from the Buy American Act provided in annual appropriations acts since Fiscal Year 2004 because the Balance of Payments Program is an extension of the requirements of the Buy American Act to supplies or construction material to be used overseas. However, although the policy stated that it could apply to supplies or construction material, it was only implemented with regard to acquisition of supplies. Therefore, this rule would make the Balance of Payments Program construction clauses consistent with the stated policy by adding:

- DFARS 252.225-7044(b)(2), which would read: “The Contractor shall use only domestic construction material in performing this contract, except for information technology that is a commercial item...”
- DFARS 252.225-7045(c)(2), which would read: “The Contractor shall use only domestic or designated country construction material in performing this contract, except for information technology that is a commercial item...”
- Paragraph (c)(2) to Alternate I of DFARS 252.225-7045, which would read: “The Contractor shall use only domestic or designated country construction material other than Bahrainian or Mexican construction material in performing this contract, except for information technology that is a commercial item...”

Comments on the proposed rule must be submitted no later than August 9, 2010, identified as “DFARS Case 2009-D041,” 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.

■ **Contractor Insurance/Pension Review:** This proposed rule would remove and relocate the requirements for conducting a Contractor Insurance/Pension Review (CIPR) from the “Procedures, Guidance, and Information” (PGI), which consists of internal procedures, to DFARS 242.7302, Requirements.

In 2006, the CIPR requirements were removed from DFARS 242.7302 and relocated to the PGI as part of the DFARS Transformation Effort. However, this proposed rule would move the CIPR requirements back to the DFARS because the threshold and requirements for conducting a CIPR are DOD-wide policy that has a significant effect beyond the internal operating procedures of DOD. Since conduct of a CIPR impacts industry, as contractors are required to provide documentation to support the reviews, DOD believes the requirements for CIPR should be located in the DFARS.

Comments on the proposed rule must be submitted no later than August 10, 2010, identified as “DFARS Case 2009-D025,” 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.

For more on the move of CIPR requirements from the DFARS to the PGI, see the March 2006 *Federal Contracts Perspective* article “DOD Suspends SDB Evaluation Adjustment Another Year.”

■ **Class Deviation on Notification of Employee Rights Under the National Labor Relations Act:** This class deviation, issued by the USD(AT&L), implements Executive Order 13496, Notification of Employee Rights Under Federal Labor Laws, which requires the inclusion of a contract clause (the text of which is in Section 2 of the executive order) that requires contractors to display a notice to employees of their rights under federal labor laws. The executive order requires that this clause be included in all contracts except those under the simplified acquisition threshold, are for work performed outside the United States, or are covered by an exemption granted by the Secretary of Labor. Subsequently, the Department of Labor (DOL) issued rules implementing the executive order, including the required contract clause (Appendix A to Subpart A of Part 471 of DOL’s regulations) and the Secretary of Labor’s notice of “Employee Rights Under the National Labor Relations Act.” DOL’s regulations go into effect June 21, 2010.

While an interim rule amending the FAR to implement the executive order and DOL’s regulations is being prepared, the USD(AT&L) has decided that it is necessary to issue a class deviation to enable contractors to comply with the executive order and DOL’s regulations.

This class deviation requires inclusion of FAR 52.222-99, Notification of Employee Rights Under the National Labor Relations Act (Deviation 2010-O0013), in all contracts issued after June 21, 2010, except those that are excluded. This deviation will remain in effect until the FAR interim rule is issued.

For more on Executive Order 13496, see the March 2009 *Federal Contracts Perspective* article “Obama Issues Four Labor-Related Executive Orders.”

■ **Reinstatement of Small Business Set-Asides Under the Small Business Competitiveness Demonstration Program:** This memorandum from the USD(AT&L) notifies the DOD workforce that small business set-asides are being reinstated for construction and architectural and engineering services under FAR Subpart 19.10, Small Business Competitiveness Demonstration Program, and DFARS Subpart 219.10.

Under the Small Business Competitiveness Demonstration Program, the use of small business set-asides is prohibited for five Designated Industry Groups (DIGs): construction (except dredging); non-nuclear ship repair; architectural and engineering services (including surveying and mapping); refuse systems and related services; and landscaping and pest control services. Small business set-asides may be used to acquire services in these DIGs only when the participating agency’s procurement data reveals the statutory 40% small business goal for a particular DIG was not achieved, and then only by those organizational units (that is, military departments or other DOD agencies) that did not meet the 40% small business goal.

DOD has determined that during Fiscal Year 2009 it failed to meet the 40% small business goal in the following DIGs:

- DIG 1, Construction
 - Subsector 236, Construction of Buildings
 - Subsector 237, Heavy and Civil Engineering Construction
- DIG 3, Architectural and Engineering Services

Therefore, future contracting opportunities for these requirements are to be awarded through the use competition restricted to small businesses.

In addition, the memorandum lists the organizational units and the DIGs/Subsectors/North American Industrial Classification System (NAICS) codes for which competition will be limited to small businesses. Among the organizational units are the Departments of the Army, Navy, and Air Force; DOD Education Agency; Defense Finance and Accounting Service; Defense

Information Systems Agency; Defense Logistics Agency; Defense Threat Reduction Agency; and Washington Headquarters Service.

■ **Competition Related Changes in the Federal Procurement Data System (FPDS):** This memorandum provides updated instructions for reporting contract information to the FPDS (https://www.fpds.gov/fpdsng_cms/) and to standardize DOD and civilian agency reporting procedures. These changes: (1) add or revise FPDS fields for Other Than Full and Open Competition; (2) identifies the extent that fair opportunity was given to orders under multiple award contracts; and (3) uses blanket purchase agreement (BPA), blanket ordering agreement (BOA), and BPA call use cases to report contract actions. Previously, DOD only used the indefinite-delivery contract and task/delivery order use cases – this resulted in Federal Supply Schedule BPAs, FAR Part 13 BPAs and BOAs, and FAR Part 16 task and delivery order contracts all being treated the same though they have different competition requirements.

■ **Full and Open Competition Requirement for Congressionally Directed Spending Items and Earmarks Intended for “For-Profit” Entities:** This memorandum, issued by the USD(AT&L) and the Under Secretary of Defense (Comptroller), provides guidance for complying with Section 8121 of the DOD Appropriation Act for Fiscal Year 2010 (Public Law 111-118), which imposes competition requirements on congressionally directed spending items and earmarks intended for award to a “for-profit” entity. The statutory competition requirements mandated by Section 8121(c) are more stringent for congressionally directed spending items and earmarks intended for award to a “for-profit” entity sponsored solely by members of the House of Representatives than for those sponsored by members of the Senate, including those jointly sponsored by members of the House and the Senate (Section 8121(a)).

Section 8121(c) requires DOD to apply acquisition regulation full and open competition rules to earmark awards intended for “for-profit” entities on the same basis as non-earmark spending on contracts with “for-profit” entities. Sections 8121(a) and (c) differ because Section 8121(c) does not allow DOD to apply exceptions to full and open competition provided for in the acquisition regulations.

Therefore, comptroller, contracting, and program/project management personnel are directed to “work collaboratively to identify the applicable ‘for-profit’ earmarks sponsored solely by members of the House of Representatives and ensure Section 8121(c) compliance. The earmark database currently in use by comptroller and contracting personnel should also be used to report information on earmarks associated with Section 8121. All awards must be timely and accurately updated in the database.”

■ **Better Buying Power: Mandate for Restoring Affordability and Productivity in Defense Spending:** This memorandum from the USD(AT&L) provides direction on “delivering better value to the taxpayer and improving the way the Department does business.”

“We need to restore affordability to our programs and activities,” writes the USD(AT&L). “I would like us to embark upon a process today to identify and then act on steps we can take to obtain two to three percent net annual growth in warfighting capabilities without incurring a commensurate budget increase by identifying and eliminating unproductive or low-value-added overhead; in effect, doing more without more.”

The charts attached to the memorandum provide an “initial framework for restoring affordability in defense.” Among the initiatives listed on the charts are: use proper contract types; align policy on profit and fee to circumstance; involve small businesses; reward excellent suppliers (like the proposed Navy preferred supplier program – see the June 2010 *Federal Contracts Perspective* article “DOD Publishes Five Proposed Rules, Two Deviations”); adopting

“should cost” and “will cost” management; strengthening the acquisition workforce; improving audits; stabilizing production rates; establishing senior managers for procurement of services; and protecting the technology base.

NONMANUFACTURER RULE WAIVED FOR LPG

The Small Business Administration (SBA) is waiving 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.

There were two requests for comments on the 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 concluded that it should have been more specific, so it issued a second request for comments on the proposed waiver of the nonmanufacturing rule for LPG (see the April 2010 *Federal Contracts Perspective* article “Liquid Propane Gas Nonmanufacturer Waiver Proposed”). No comments were submitted in response to the second request, so the waiver is granted.

In addition, the SBA is proposing a class waiver of the nonmanufacturer rule for configured tape library storage equipment under North American Industry Classification System (NAICS) code 334112, Computer Storage Device Manufacturing, Product Service Code (PSC) 7025, Automated Data Processing (ADP) Input/Output and Storage Devices, PSC 7035, ADP Support Equipment, and PSC 7045 ADP Supplies. 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 22, 2010, to Edith Butler, 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.

PROMPT PAYMENT INTEREST RATE SET AT 3 1/8%

The Treasury Department has established 3 1/8% (3.125%) as the interest rate for the computation of payments made between July 1 and December 31, 2010, under the Prompt Payment Act and the Contracts Disputes Act. This rate is also used in facilities capital cost of money calculations. The interest rate for the prior six-month period (January 1, 2010, through June 30, 2010), was 3 1/4% (3.25%). The interest rate for July 1, 2009, through December 31, 2009, was 4 7/8% (4.875%).

All prompt payment interest rates since 1980 (in six-month increments) are available at http://www.treasurydirect.gov/govt/rates/tcir/tcir_opdprmt2.htm.

FAR Subpart 32.9, Prompt Payment; FAR Subpart 33.2, Disputes and Appeals; FAR 31.205-10, Cost of Money; and Cost Accounting Standard (CAS) 9904.414, Cost of Money as an Element of the Cost of Facilities Capital, are affected by this interest rate.

DOE PROPOSES TO UPDATE DEAR

The Department of Energy (DOE) is proposing to update the DOE Acquisition Regulation (DEAR) to make changes to conform to the FAR, remove out-of-date coverage, and to update references.

The DEAR parts that would be affected by these two proposed rules are:

- Part 919, Small Business Programs
- Part 922, Application of Labor Laws to Government Acquisition
- Part 923, Environment, Conservation, Occupational Safety, and Drug-Free Workplace
- Part 925, Foreign Acquisition
- Part 926, Other Socioeconomic Programs
- Part 952, Solicitation Provisions and Contract Clauses
- Part 970, DOE Management and Operating Contracts

In addition, a new DEAR Part 924, Protection of Individual Privacy, would be added.

None of these changes are substantive or of a nature to cause any significant expense for DOE or its contractors.

Also, DEAR Parts 919 and 926 will have another proposed rule to cover additional changes.

Comments on the proposed changes to DEAR Parts 919 through 952 must be submitted no later than July 15, 2010, identified as “DEAR: Subchapter I and RIN 1991-AB91,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: DEARrulemaking@hq.doe.gov; or (3) mail: Mail to: U.S. Department of Energy, Office of Procurement and Assistance Management, MA-611, 1000 Independence Avenue, SW, Washington, DC 20585.

Comments on the proposed changes to DEAR Part 970 must be submitted no later than July 9, 2010, identified as “DEAR: Subchapter D and RIN 1991-AB87,” by any of the methods mentioned above.

DHS FINALIZES TEXTILES RULE, PROPOSES EMERGENCY LIMITS

The Department of Homeland Security (DHS) is finalizing, without changes, the interim rule that implemented restrictions on its acquisition of certain clothing and other textile products directly related to the national security interests of the United States. In addition, DHS is proposing to implement a statutory requirement limiting the use of subcontractors on cost-reimbursement type contracts to facilitate the response to or recovery from a natural disaster or act of terrorism or other man-made disaster.

■ **Limiting the Acquisition of Products Containing Textiles from Sources Outside the United States:** This finalizes, without changes, the interim rule that added Homeland Security Acquisition Regulation (HSAR) Subpart 3025.70, American Recovery and Reinvestment Act Restrictions on Foreign Acquisition, and the corresponding clause HSAR 3052.225-70,

Requirement for Use of Certain Domestic Commodities, to implement Section 604 of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5).

Section 604 and the implementing interim rule restrict the acquisition of the following items to those grown, reprocessed, reused, or produced in the United States when the items are directly related to the national security interests of the United States:

- Commercial or non-commercial clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing (and the materials and components thereof)
- Commercial or non-commercial tents, tarpaulins, covers, textile belts, bags, protective equipment (such as body armor), sleep systems (sleeping bags), load carrying equipment (such as fieldpacks), textile marine equipment, parachutes or bandages
- Non-commercial cotton and other natural fiber products
- Non-commercial woven silk or woven silk blends
- Non-commercial spun silk yarn for cartridge cloth
- Non-commercial synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics)
- Non-commercial canvas products
- Non-commercial wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles)

However, there are many exceptions, including acquisitions under the simplified acquisition threshold (\$100,000); acquisitions not directly related to the national security interests of the United States; acquisitions by vessels in foreign waters; and acquisitions of incidental amounts of cotton, other natural fibers, wool or other covered items that are incorporated into an end item.

DHS received comments from 26 respondents, but decided not to incorporate any of the comments, so it is finalizing the interim rule without change. For more on the interim rule, see the September 2009 *Federal Contracts Perspective* article “DHS Places Restrictions on Textile Acquisitions.”

■ **Limitations on Subcontracting in Emergency Acquisitions:** This proposed rule would implement Section 692 of the Post-Katrina Emergency Management Reform Act of 2006 (Public Law 109-295), which establishes a limitation on subcontracting for cost-reimbursement type contracts above the simplified acquisition threshold entered into to facilitate the response to or recovery from a natural disaster or act of terrorism or other man-made disaster. Congress enacted the limitation based on findings that excessive tiering of subcontractors under disaster recovery cost-reimbursement type contracts leads to inflated overhead charges and poor prime contractor oversight over subcontractor work.

HSAR Subpart 3016.3, Cost-Reimbursement Contracts, the corresponding clause HSAR 3052.216-75, Limitations on Subcontracting in Emergency Acquisitions, and the corresponding provision HSAR 3052.216-76, Proposal Information on Limitations on Subcontracting in Emergency Acquisitions, would be added.

- HSAR 3016.370, Limitations on Subcontracting in Emergency Acquisitions, would prohibit prime contractors from subcontracting more than 65% of the cost of the action (exclusive of indirect costs and fee) if the dollar value of the action is above the simplified acquisition threshold (\$100,000) and if the action is entered into to facilitate response to or recovery from: (1) a major disaster or emergency declared by the president under Title IV or Title V of the Robert T. Stafford Disaster Relief and Emergency

Assistance Act; (2) an uncontrolled fire or fire complex, threatening such destruction as would constitute a major disaster, and for which the Federal Emergency Management Agency has approved a fire management assistance declaration; or (3) an incident for which the National Operations Center (NOC), through the National Response Coordination Center (NRCC), coordinates the activation of the appropriate Emergency Support Functions and the Secretary of Homeland Security has designated a Federal Resource Coordinator (FRC) to manage Federal resource support. However, this limitation may be waived if an official one level above the contracting officer determines it is not feasible or practicable to apply it to a contract action or class of contract actions.

- HSAR 3052.216-75 would be required to be included in solicitations, contracts, task orders, and delivery orders that are cost reimbursement and exceed the simplified acquisition threshold if the action is entered into to facilitate response to or recovery from a major disaster or emergency, an uncontrolled fire or fire complex, or an incident for which the NOC coordinates the activation of the appropriate Emergency Support Functions. The clause reiterates the limitations in Section 694, prohibits the contractor from subcontracting more than 65% of the contract cost (excluding indirect costs incurred by the contractor and fee paid to the contractor), and requires the contractor to notify the contracting officer annually the total cost (less indirect costs and fee) it has incurred for the previous 12-month period and the total subcontracted cost during the same period. If the percentage of costs incurred by its subcontractors exceeds 65%, the contractor must describe the reason(s) the percentage of subcontracted cost exceeded 65% and provide a plan for becoming compliant with the requirements of the clause.
- HSAR 3052.216-76 would be required to be included in solicitations for cost reimbursement contracts, task orders, and delivery orders expected to exceed the simplified acquisition threshold if the action is entered into to facilitate response to or recovery from a major disaster or emergency, an uncontrolled fire or fire complex, or an incident for which the NOC coordinates the activation of the appropriate Emergency Support Functions. It would require the offeror to include in its proposal acceptable evidence of the offeror's ability to satisfy this requirement. If the offeror does not expect that compliance with these limits will be practicable or feasible, it must include a written request for waiver in its offer along with supporting rationale.

Comments on this proposed rule must be submitted no later than August 9, 2010, by either of the following methods: (1) Federal eRulemaking portal at <http://www.regulations.gov>; or (2) by mail to: Department of Homeland Security, Office of the Chief Procurement Officer, Acquisition Policy and Legislation Branch, ATTN: Jeremy Olson, 245 Murray Drive, Bldg. 410 (RDS), Washington, DC 20528. Identify all comments by referring to "DHS-2010-0045."

OMB ORDERS HALT TO FINANCIAL SYSTEMS ACQUISITIONS

Peter Orszag, the director of the Office of Management and Budget (OMB), has directed most federal agencies to refrain from awarding new task orders or contracts for financial system modernization projects pending review and approval by OMB.

"Federal Information Technology (IT) projects too often cost more than they should, take longer than necessary to deploy, and deliver solutions that do not meet our business needs," wrote Orszag. "Although these problems exist across our IT portfolio, financial systems

modernization projects in particular have consistently underperformed in terms of cost, schedule, and performance.”

The memorandum applies to agencies subject to the Chief Financial Officers (CFO) Act: the Cabinet agencies; Agency for International Development; Environmental Protection Agency; General Services Administration; National Aeronautics and Space Administration; National Science Foundation; Nuclear Regulatory Commission; Office of Personnel Management; Small Business Administration; and Social Security Administration.

The memorandum states that OMB’s reviews of financial projects will be based on the following principles:

- ***Split projects into smaller, simpler segments with clear deliverables.*** “Project segments should generally take no longer than 90 -120 days to achieve specific project milestones.”
- ***Focus on most critical business needs first.*** “Historic practice in Federal IT system projects has been to attempt to address a wide range of needs at once through expansive process reengineering projects. The complexity involved in this approach has added substantially to costs, significantly increased risks and delayed implementation of all functionality, including the most critical needs.
- ***Ongoing, transparent project oversight.*** “One of the major causes of IT system failure is insufficient oversight by senior management.”

Attached to the memorandum is a financial system template that all covered agencies will use to provide revised project plans that clearly outline the project’s strategy for reducing costs, shortening the project timeline, and reducing risks.

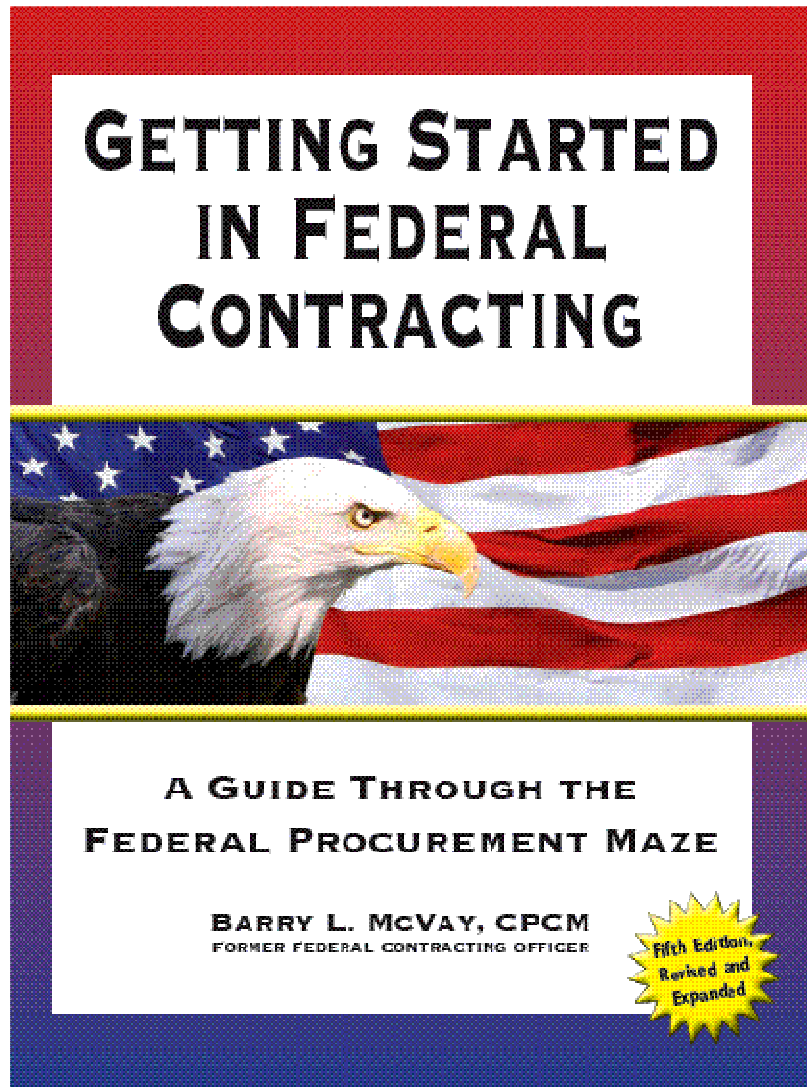
The following is the schedule for financial system reviews:

- July 9, 2010 – Departments of Homeland Security, Energy, and Veterans Affairs
- July 16, 2010 – Departments of Interior, Commerce, and Housing and Urban Development
- July 23, 2010 – Departments of Justice and Health and Human Services, and the Environmental Protection Agency
- July 30, 2010 – Department of the Treasury
- August 6, 2010 – Department of Transportation, General Services Administration, and the Office of Personnel Management
- August 13, 2010 – U.S. Department of Agriculture, National Science Foundation, Small Business Administration, and the Nuclear Regulatory Commission
- August 20, 2010 – Departments of Education and Labor, and the Social Security Administration
- August 27, 2010 – Department of State, Agency for International Development, and National Aeronautics and Space Administration

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426 pages, 2009, ISBN: 978-1-912481-26-5, \$49.95
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