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FY 2014 NATIONAL DEFENSE AUTHORIZATION ACT ESTABLISHES $625,000 AS COMPENSATION AMOUNT (MAYBE)

On December 26, 2013, President Obama signed into law the $633 billion National Defense Authorization Act for Fiscal Year (FY) 2014 (Public Law 113-66). Title VIII, Acquisition Policy, Acquisition Management, and Related Matters, is very small this year; it contains only a single section that is significant to the defense and civilian acquisition communities – Section 811, Government-Wide Limitations On Allowable Costs For Contractor Compensation (though another law may establish a different limitation). In addition, Title XVI, Industrial Base Matters, Subtitle B, Matters Relating to Small Business Concerns, contains a couple of sections that will affect certain defense contractors.

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■ **Section 811, Government-Wide Limitations On Allowable Costs for Contractor Compensation:** Section 811 establishes $625,000 as the limit on the amount the government will reimburse defense and civilian contractors for employee compensation (allowable compensation under paragraph (p) of Federal Acquisition Regulation [FAR] 31.205-6, Compensation for Personal Services). This replaces the statutory formula that was in Title 41 of the U.S. Code, Section 1127, Determining Benchmark Compensation Amount. This formula established the benchmark as "the median [50th percentile] amount of compensation provided for all senior executives of all benchmark corporations for the most recent year for which data is available at the time the determination…is made." The term "benchmark corporation" was defined as "a publicly-owned United States corporation that has annual sales in excess of $50,000,000 for the fiscal year."

This limit applies to all contractor employees on contracts with the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard. For all other federal agencies, this limit applies to "the five most highly compensated employees in management positions at each home office and each segment of the contractor." While the statute places a cap on the amount that the government will reimburse the contractor, it does not limit the amount of compensation that the contractor actually pays its employees. Contractors can provide compensation to their employees that exceed the compensation benchmark amount.

The benchmark compensation amount was set at $250,000 in 1997, and it was required to be adjusted every fiscal year. The amount was expected to track inflation closely, but this was not

the case, as executive compensation skyrocketed. The annual benchmark compensation amounts were adjusted to the following:

1997 – $250,000	2005 – $473,318
1998 – $340,650	2006 – $546,689
1999 – $342,986	2007 – $597,912
2000 – $353,010	2008 – $612,196
2001 – $374,228	2009 – $684,181
2002 – $387,783	2010 – $693,951
2003 – $405,273	2011 – $763,029
2004 – $432,851	2012 – $952,308

In a memorandum, Office of Federal Procurement Policy administrator Joseph Jordan established $952,308 as the benchmark compensation amount for 2012 and wrote the following:

> When the cap was raised to $693,951 for Fiscal Year (FY) 2010, the president called on Congress to repeal the current statutory formula and replace it with a lower, more sensible limit that is on par with what the government pays its own executives and employees. Over the last several years, the administration has strongly reiterated the need for reforms to the current statutory framework and Congress has considered several proposals to reform the compensation cap. To date, however, Congress has not revised the cap amount or the formula for adjusting the cap…Because Congress has not changed or replaced the statutory formula for setting the cap, the administration is compelled by statute to raise the cap for another year in accordance with that statutory formula [to $952,308]…As has been amply demonstrated throughout the 15 years in which this statutory formula has governed, the statutory reliance on the survey data bears no relationship to (1) the type of work that contractor employees are actually performing under applicable federal contracts and (2) the general trends in the U.S. economy with respect to increases in prices and wages. The statutorily-driven outcome is that, each year, taxpayers must continue to go even further down the path of paying for increases in the reimbursement cap that far outpace the growth of inflation and the wages of most of America's working families.

Finally, Congress decided to address this issue with the inclusion of Section 811 in the FY 2014 National Defense Authorization Act. The $625,000 amount will apply to all contractor employees, and it will be adjusted annually to reflect the U.S. Bureau of Labor Statistics Employment Cost Index for total compensation for private industry workers. However, agency heads "may establish exceptions for positions in the science, technology, engineering, mathematics, medical, and cybersecurity fields and other fields requiring unique areas of expertise…"

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There is a complication, though. Section 702 of the Bipartisan Budget Act of 2013 (Public Law 113-67) makes the exact same changes as Section 811 of the FY 2014 National Defense Authorization Act *except* that it establishes *$487,000* as the amount. Since President Obama signed the Bipartisan Budget Act minutes after he signed the National Defense Authorization Act, it would appear that the $487,000 overrides the $625,000. *Send in the lawyers!*

For more on the benchmark compensation amount, see the May 2012 ***Federal Contracts Perspective*** article "Executive Compensation Set at $763,029."

■ **Section 1611, Advancing Small Business Growth:** DOD is required to include a clause in any covered contract with a small business that "(A) requires the contractor to acknowledge that acceptance of the contract may cause the business to exceed the applicable small business size standards…for the industry concerned and that the contractor may no longer qualify as a small business concern for that industry; and (B) encourages the contractor to develop capabilities and characteristics typically desired in contractors that are competitive as an other-than-small business in that industry." A "covered contract" is one that is awarded to a small business with an estimated annual value "that will exceed the applicable receipt-based small business size standard; or if the contract is in an industry with an employee-based size standard, that will exceed $70,000,000."

■ **Section 1614, Credit for Certain Small Business Subcontractors:** This requires all contractors that maintain subcontracting plans to: "(i) review and approve subcontracting plans submitted by their subcontractors; (ii) monitor subcontractor compliance with their approved subcontracting plans; (iii) ensure that subcontracting reports are submitted by their subcontractors when required; (iv) acknowledge receipt of their subcontractors' reports; (v) compare the performance of their subcontractors to subcontracting plans and goals; and (vi) discuss performance with subcontractors when necessary to ensure their subcontractors make a good faith effort to comply with their subcontracting plans…" Section 1614 goes on to provide: "(A) For purposes of determining whether or not a prime contractor has attained the percentage goals…(i) if the subcontracting goals pertain only to a single contract with the executive agency, the prime contractor shall receive credit for small business concerns performing as first tier subcontractors or subcontractors at any tier pursuant to the subcontracting plans…in an amount equal to the dollar value of work awarded to such small business concerns; and (ii) if the subcontracting goals pertain to more than one contract with one or more executive agencies, or to one contract with more than one executive agency, the prime contractor may only count first tier subcontractors that are small business concerns."

FAC 2005-72 REVISES TRADE AGREEMENTS THRESHOLDS

Federal Acquisition Circular (FAC) 2005-72 updates Federal Acquisition Regulation (FAR) part 25, Foreign Acquisition, to reflect the United States Trade Representative's (USTR) biannual revision of thresholds for application of the various trade agreements into which the United States has entered with other countries. In addition, FAC 2005-72 addresses service contracts reporting requirements, prioritizing government sources of supplies and services, and prohibits the use of open-ended indemnification clauses in acquisitions for social media applications.

■ **Trade Agreements Thresholds:** This final rule revises FAR part 25, Foreign Acquisition, to incorporate revised thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the United States Trade Representative (USTR). The USTR makes adjustments to these thresholds every two years.

The following are the revised thresholds (with the previous thresholds in parentheses):

– ***World Trade Organization* (WTO) *Agreement on Government Procurement* (GPA)**
  Supplies: **$204,000** ($202,000)
  Services: **$204,000** ($202,000)
  Construction: **$7,864,000** ($7,777,000)

– ***U.S.-Australia Free Trade Agreement* (FTA)**
  Supplies: **$79,507** ($77,494)
  Services: **$79,507** ($77,494)
  Construction: **$7,864,000** ($7,777,000)

– ***U.S.-Bahrain FTA***
  Supplies: **$204,000** ($202,000)
  Services: **$204,000** ($202,000)
  Construction: **$10,335,931** ($10,074,262)

– ***U.S.-Dominican Republic-Central America FTA* (CAFTA-DR)**
  Supplies: **$79,507** ($77,494)
  Services: **$79,507** ($77,494)
  Construction: **$7,864,000** ($7,777,000)

– ***U.S.-Chile FTA***
  Supplies: **$79,507** ($77,494)
  Services: **$79,507** ($77,494)
  Construction: **$7,864,000** ($7,777,000)

– ***U.S.-Columbia Trade Promotion Agreement* (TPA)**
  Supplies: **$79,507** ($77,494)
  Services: **$79,507** ($77,494)
  Construction: **$7,864,000** ($7,777,000)

– ***U.S.-Korea FTA***
  Supplies: **$100,000** (unchanged)
  Services: **$100,000** (unchanged)
  Construction: **$7,864,000** ($7,777,000)

– ***U.S.-Morocco FTA***
  Supplies: **$204,000** ($202,000)
  Services: **$204,000** ($203,000)
  Construction: **$7,864,000** ($7,777,000)

– ***North American FTA*** **(NAFTA)**

Canada

Supplies: **$25,000** (unchanged)
Services: **$79,507** ($77,494)
Construction: **$10,335,931** ($10,074,262)

Mexico

Supplies: **$79,507** ($77,494)
Services: **$79,507** ($77,494)
Construction: **$10,335,931** ($10,074,262)

– ***U.S.-Oman FTA***

Supplies: **$204,000** ($202,000)
Services: **$204,000** ($203,000)
Construction: **$10,335,931** ($10,074,262)

– ***U.S.-Panama FTA***

Supplies: **$204,000** ($202,000)
Services: **$204,000** ($202,000)
Construction: **$7,864,000** ($7,777,000)

– ***U.S.-Peru TPA***

Supplies: **$204,000** ($202,000)
Services: **$204,000** ($202,000)
Construction: **$7,864,000** ($7,777,000)

– ***U.S.-Singapore FTA***

Supplies: **$79,507** ($77,494)
Services: **$79,507** ($77,494)
Construction: **$7,864,000** ($7,777,000)

– ***Israeli Trade Act***

Supplies: **$50,000** (unchanged)

Besides implementing the new thresholds in FAR subpart 25.4, Trade Agreements, this final rule revises other sections of the FAR that include trade agreements thresholds: FAR 22.1503, Procedures for Acquiring End Products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor; FAR 25.202, Exceptions [to the Buy American Act for construction materials]; FAR 25.603, Exceptions [to the American Recovery and Reinvestment Act pertaining to the Buy American Act for construction]; FAR 25.1101, Acquisition of Supplies; and FAR 25.1102, Acquisition of Construction. In addition, changes are required to the following clauses: FAR 52.204-8, Annual Representations and Certifications; and FAR 52.222-19, Child Labor – Cooperation with Authorities and Remedies.

EDITOR'S NOTE: The Department of Defense has incorporated these threshold changes into its DOD FAR Supplement (DFARS) 225.1101, Acquisition of Supplies; DFARS 225.7017-3, Exceptions [involving utilization of domestic photovoltaic devices]; DFARS 225.7503, Contract Clauses [for the Balance of Payments Program]; DFARS 252.225-7017, Photovoltaic

Devices; and DFARS 252.225-7018, Photovoltaic Devices – Certificate. DOD has its own DFARS part 225 addressing foreign acquisitions because of the significant differences between its procedures, requirements, and restrictions and those that apply to the civilian agencies (most of which are mandated by Congress).

■ **Service Contracts Reporting Requirements:** This final rule adds FAR subpart 4.17, Service Contracts Inventory, to implement Section 743 of the Consolidated Appropriations Act for Fiscal Year 2010 (Public Law 111-117), which requires federal agencies, except the DOD, to submit annual inventories of activities performed by service contractors. FAR subpart 4.17 specifies the reporting requirements, based on type of contract and dollar amount. (DOD is exempt from this reporting requirement because it is already required to develop and submit an annual service contract inventory.)

FAR 4.1703, Reporting Requirements, requires reporting of service contracts and first-tier service subcontracts according to the following thresholds:

- All cost-reimbursement, time-and-materials, and labor-hour service contracts and orders with an estimated total value above the simplified acquisition threshold ($150,000).
- All fixed-price service contracts awarded and orders issued according to the following thresholds:
  - Awarded or issued in FY 2014, with an estimated total value of $2,500,000 or greater.
  - Awarded or issued in FY 2015, with an estimated total value of $1,000,000 or greater.
  - Awarded or issued in FY 2016, and subsequent years, with an estimated total value of $500,000 or greater.

For indefinite-delivery contracts, "reporting shall be determined based on the type and estimated total value of the orders issued under the contract. Indefinite-delivery contracts include, but are not limited to, contracts such as indefinite-delivery indefinite-quantity (IDIQ) contracts, Federal Supply Schedule contracts (FSSs), governmentwide acquisition contracts (GWACs), and multi-agency contracts."

FAR 4.1703(b) goes on to require agencies to ensure that contractors comply with the reporting requirements of new FAR 52.204-14, Service Contract Reporting Requirements, and new FAR 52.204-15, Service Contract Reporting Requirements for Indefinite-Delivery Contracts:

(1) Contract number and order number, if applicable;
(2) The total dollar amount invoiced for services performed during the previous government fiscal year under the contract;
(3) The number of contractor direct labor hours expended on the services performed during the previous government fiscal year; and
(4) Data reported by subcontractors (that is, the subcontract number [including subcontractor name and DUNS number], and the number of first-tier subcontractor direct-labor hours expended on the services performed during the previous government fiscal year.)

FAR 4.1703(e) requires agencies to review the contractor reported information for reasonableness and consistency with available contract information. "In the event the agency believes that revisions to the contractor reported information are warranted, the agency shall

notify the contractor no later than November 15. By November 30, the contractor shall revise the report, or document its rationale for the agency." Each agency will compile an annual inventory of service contracts performed for the agency during the prior fiscal year ("to determine the extent of the agency's reliance on service contractors"). This inventory is to be posted on the agency's website, and a notice of inventory availability must be published in the ***Federal Register*** no later than February 15.

Twelve respondents submitted comments on the proposed rule. Other than revising the subpart numbering from the proposed FAR subpart 4.16 to FAR subpart 4.17, and adding FAR 52.204-14 and FAR 52.204-15 to FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items, because the FAR Council has determined the rule should apply to contracts for the acquisition of commercial items, the changes made to the final rule are administrative and editorial.

For more on the proposed rule, see the May 2011 ***Federal Contracts Perspective*** article "Proposals on Service Contract, Property Reporting."

■ **Prioritizing Sources of Supplies and Services for Use by Government:** This final rule revises FAR part 8, Required Sources of Supplies and Services, to update and clarify the priority of sources of supplies and services for use by the government.

Previously, FAR 8.002, Priorities for Use of Government Supply Sources, had addressed both mandatory and non-mandatory sources of supplies and services. To clarify, a rule was proposed to limit FAR 8.002 [to be retitled "Priorities for Use of Mandatory Government Sources"] to a discussion of the mandatory government sources of supplies and services, and to add a new FAR 8.004, Use of Other Sources, to encourage agencies, after first considering the mandatory sources, to give priority consideration to using existing contracts intended for use by multiple agencies (for example, Federal Supply Schedules, governmentwide acquisition contracts [GWACs], multi-agency contracts [MACs]), and services provided by the Federal Prison Industries, Inc.) before satisfying requirements for supplies and services from commercial sources in the open market.

Seventy-nine respondents submitted comments on the proposed rule. Besides making several editorial changes, the final version of FAR 8.004 is revised to note that the non-mandatory sources are not listed in any order of priority, and to add the following sentence: "When satisfying requirements from non-mandatory sources, see [FAR] 7.105(b) [Contents of Written Acquisition Plans] and [FAR] part 19 [Small Business Programs] regarding consideration of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including 8(a) participants), and women-owned small business concerns."

For more on the proposed rule, see the July 2011 ***Federal Contracts Perspective*** article "FAR Rules on Prioritizing Supply Sources, Performance."

■ **Terms of Service and Open-Ended Indemnification, and Unenforceability of Unauthorized Obligations:** This finalizes, without changes, the interim rule that added FAR 32.705, Unenforceability of Unauthorized Obligations, and new clause FAR 52.232-39, Unenforceability of Unauthorized Agreements, to address the use of unrestricted, open-ended indemnification clauses in acquisitions for social media applications ("any such clause is unenforceable against the government…neither the government nor any government authorized end user shall be deemed to have agreed to such clause by virtue of it appearing in the End User

License Agreements (EULA), Terms of Service (TOS), or other similar legal instruments or agreements…any such clause is deemed to be stricken from the EULA, TOS, or similar legal instrument or agreement…").

One respondent submitted comments on the interim rule, but no changes were made to the final rule in response to those comments.

For more on the interim rule, see the July 2013 ***Federal Contracts Perspective*** article "FAC 2005-67 Removes Limits on WOSB Set-Asides, Addresses Concerns with Acquisition of Social Media."

LOTS OF REVISIONS (AND PROPOSED REVISIONS) TO THE DFARS

The Department of Defense (DOD) decided to clear it's desk for the holidays by issuing three final DOD FAR Supplement (DFARS) rules, an interim rule, and three proposed rules.

■ **Preparation of Letter of Offer and Acceptance:** This finalizes, without changes, the proposed rule that would address the contracting officer's role in assisting the DOD implementing agency in preparing the letter of offer and acceptance (LOA) for a foreign military sales (FMS) program that will require an acquisition.

The rule revises and moves the text in paragraph (1) of Procedures, Guidance, and Information (PGI) 225.7302, Guidance [on FMS acquisitions), to DFARS 225.7302, Preparation of Letter of Offer and Acceptance (currently titled "Guidance"), because of the potential effect on contractors. PGI 225.7302(1) stated, "For FMS programs that will require an acquisition, the contracting officer will assist the DOD implementing agency responsible for preparing the LOA [letter of offer and acceptance] by (1) working with prospective contractors..." Because the PGI is intended for DOD personnel while the DFARS is intended for both DOD personnel and contractors, it was thought that PGI 225.7302(1) was more appropriately located in DFARS 225.7302.

No comments were submitted on the proposed rule, so it is adopted as final without changes. For more on the proposed rule, see the June 2013 ***Federal Contracts Perspective*** article "Defense Regulation-Making Picks Up Pace."

■ **Unallowable Fringe Benefit Costs:** This finalizes, with changes, the proposed rule that would amend DFARS 231.205-6, Compensation for Personal Services, to explicitly state that "fringe benefit costs that are contrary to law, employer-employee agreement, or an established policy of the contractor are unallowable."

Paragraph (m) of FAR 31.205-6, Compensation for Personal Services, states "the costs of fringe benefits re benefits are allowable to the extent that they are reasonable and are required by law, employer-employee agreement, or an established policy of the contractor." However, FAR 31.205-6(m) does not state that fringe benefit costs that do not meet these criteria are expressly unallowable. Therefore, it was proposed that DFARS 231.205-6(m)(1) be added, which would state, "Fringe benefit costs incurred or estimated that are contrary to law, employer-employee agreement, or an established policy of the contractor are unallowable."

Two respondents submitted comments on the proposed rule. In response to one of the comments, the words "incurred or estimated" have been removed, so that (m)(1) now states

"Fringe benefit costs that are contrary to law, employer-employee agreement, or an established policy of the contractor are unallowable."

For more on the proposed rule, see the March 2013 ***Federal Contracts Perspective*** article "DOD Issues Rules on Acquiring Tents, Alleged Crimes."

■ **Item Unique Identifier Update:** This final rule revises DFARS 252.211-7003, Item Identification and Valuation, which requires unique identification for all delivered items for which the government's unit acquisition cost is $5,000 or more and for other items designated by the government, to update and clarify instructions for the identification and valuation processes.

The changes to DFARS 252.211-7003 include the following:

- Definitions for "data matrix" and "type designation" are added.
- Item unique identification requirements for items with warranty requirements, DOD serially managed items, and special tooling or special test equipment are specifically addressed.
- The data submission requirements for a Major Defense Acquisition Program (MDAP) are clarified.
- An alternative data submission method using either hard copy or a wide-area-workflow attachment is added.

Corresponding changes are made to DFARS 211.274, Item Unique Identification and Valuation Requirements, and DFARS Appendix F, Material Inspection And Receiving Report.

■ **Photovoltaic Devices:** This interim rule revises DFARS 252.225-7017, Photovoltaic Devices, and DFARS 252.225-7018, Photovoltaic Devices – Certificate, to implement Section 846 of the National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383), which addresses the origin of photovoltaic devices purchased by a contractor under an energy savings performance contract, a utility service contract, or a private housing contract, and DOD takes ownership of the photovoltaic devices (this rule does not apply if DOD purchases the photovoltaic devices as end items).

DOD is considered to take ownership of a photovoltaic device if the device is installed on DOD property or in a facility owned by DOD, and it is reserved for the exclusive use of DOD for the full economic life of the device.

Section 846 requires that photovoltaic devices provided under covered contracts comply with the Buy American Act unless an exception provided in the Trade Agreements Act or some other law applies.

DOD initially implemented this statute provision by adding DFARS 225.7017, Utilization of Domestic Photovoltaic Devices; DFARS 252.225-7017, and DFARS 252.225-7018. DFARS 252.225.7017 provides that a photovoltaic device is eligible for an exception to the Buy American Act if it is manufactured by an eligible country (that is, a qualifying country, a designated country, or a country that has entered into a free trade agreement with the U.S. [see definitions in DFARS 252.225-7017 for "designated country" and "qualifying country," and FAR subpart 25.4 for the trade agreements]), or is "substantially transformed" by an eligible country into a new and different article with a name, character, or use distinct from that of the article or articles from which it was transformed.

Since then, some questions have arisen as to where the substantial transformation of some solar panels occurs, especially when different phases of the production process occur in different countries. DOD has determined, after consultation with the United States Trade Representative (USTR), that two clarifications are needed to avoid confusion:

- DFARS 252.225-7017 is revised to clarify that the country of origin is the country in which the final substantial transformation occurred. The key sentence originally stated, "In the case of an article that consists in whole or in part of materials from another country, [the photovoltaic device] has been substantially transformed in [name of country] into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed." This rule revises the sentence to: "In the case of an article that consists in whole or in part of materials from another country, [the photovoltaic device] has been substantially transformed in [name of country] into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, *provided that the photovoltaic device is not subsequently substantially transformed outside of [name of country]*" (emphasis added).

- A new paragraph (c) has been added to DFARS 252.225-7018 that directs offerors to certify the origin of a designated country photovoltaic device consistent with country of origin determinations by U.S. Customs and Border Protection for the same or similar items. If the offeror is uncertain, the offeror must request a determination from U.S. Customs and Border Protection.

Comments on this interim rule must be submitted no later than February 18, 2014, identified as "DFARS Case 2014-D006," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **dfars@osd.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Amy Williams, OUSD (AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Application of Certain Clauses to Acquisitions of Commercial Items:** This proposed rule would clarify the applicability of DFARS 252.211-7008, Use of Government-Assigned Serial Numbers, and DFARS 252.232-7006, Wide Area WorkFlow Payment Instructions, to acquisitions of commercial items by adding them to the list at DFARS 212.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, and revising their clause prescriptions to require their inclusion in solicitations and contracts for acquisitions of commercial items using the procedures in FAR part 12, Acquisition of Commercial Items.

DFARS 252.211-7008 is not listed for use in commercial acquisitions in DFARS 212.301(f), nor does its prescription in paragraph (c) of DFARS 211.274-6, Contract Clauses, address its applicability to commercial item acquisitions. However, DFARS 211.274-6(c) prescribes DFARS 252.211-7008 for use in solicitations and contracts that include DFARS 252.211-7003, Item Identification and Valuation, and DFARS 252.211-7003 is required to be included in solicitations and contracts for commercial items (see DFARS 211.274-6(a)(1) and DFARS 212.301(f)). Therefore, this proposed rule would amend both DFARS 211.274-6(c) and DFARS 212.301(f) to require the inclusion of DFARS 252.211-7008 in solicitations and contracts for commercial items.

DFARS 252.232-7006 is prescribed for use when DFARS 252.232-7003, Electronic Submission of Payment Requests and Receiving Reports, is used unless certain circumstances

apply (see paragraph (b) of DFARS 232.7004, Contract Clauses). Since DFARS 252.232-7003 is required to be included in solicitations and contracts for commercial items except under certain limited circumstances (see paragraph (a) of DFARS 232.7002, Policy), this proposed rule would amend both DFARS 212.301(f) and DFARS 232.7004(b) to require DFARS 252.232-7006 in solicitations and contracts for commercial items.

Comments on this proposed rule must be submitted no later than February 4, 2014, identified as "DFARS Case 2013-D035," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **dfars@osd.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Susan Williams, OUSD (AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Elimination of DOD-Unique List of Domestically Nonavailable Articles:** This proposed rule would remove DFARS 225.104, Nonavailable Articles, because domestic aluminum-clad steel wire is available in the United States, and DOD does not use sperm oil.

Comments on this proposed rule must be submitted no later than February 4, 2014, identified as "DFARS Case 2013-D020," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **dfars@osd.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Lee Renna, OUSD (AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Research and Development Contracting Clause With Alternate:** This proposed rule would include the full texts of DFARS 252.235-7003, Frequency Authorization, and its alternate clause, and add separate prescriptions for the clause and its alternate in DFARS 235.072, Additional Contract Clauses.

The two clauses would be designated as "Frequency Authorization – Basic" and "Frequency Authorization – Alternate," and both would be displayed in full-text. "The inclusion of the full text of the alternate clause in the regulation should make the terms of the alternate clearer to contractors and to DOD contracting officers. The current convention for alternate clauses is to show only the paragraphs that differ from the basic clause. Placing the alternate clause in full text in the regulation will clarify paragraph substitutions. As a result, inapplicable paragraphs from the basic clause that are superseded by the alternate will not be included in solicitations or contracts, reducing the potential for confusion."

DFARS 235.072 would include an overarching prescription ("Use the basic or the alternate of the clause at [DFARS] 252.235-7003, Frequency Authorization, in solicitations and contracts for developing, producing, constructing, testing, or operating a device requiring a frequency authorization"), then distinctive prescriptions for each clause ("Use the clause Frequency Authorization – Basic if agency procedures do not authorize the use of DD Form 1494, Application for Equipment Frequency Allocation, to obtain radio frequency authorization" and "Use the clause Frequency Authorization – Alternate if agency procedures authorize the use of DD Form 1494, Application for Equipment Frequency Allocation, to obtain frequency authorization").

Comments on this proposed rule must be submitted no later than February 4, 2014, identified as "DFARS Case 2013-D026," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **dfars@osd.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Annette Gray, OUSD (AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

SBA REVISES SIZE STANDARDS FOR UTILITIES, CONSTRUCTION

The Small Business Administration (SBA) has revised 13 small business size standards in North American Industry Classification System (NAICS) Sector 22, Utilities, and increased two small business size standards in NAICS Sector 23, Construction.

In 2012, SBA proposed changing nine small business size standards in NAICS Sector 22, converting six from "4 million megawatt hours" to "500 employees." However, after reviewing the comments from eight respondents on the proposed revisions, SBA decided to increase the size standards for NAICS 221112, Fossil Fuel Electric Power Generation, and NAICS 221113, Nuclear Electric Power Generation, to 750 employees, and NAICS 221122, Electric Power Distribution, to 1,000 employees.

In addition, when SBA published the proposed rule on NAICS Sector 22, the SBA's table of size standards was based on the 2007 version of the NAICS. A month after the proposed rule was published, SBA adopted the Office of Management and Budget's (OMB) 2012 NAICS amendments, which created 76 new industry codes (see the September 2012 ***Federal Contracts Perspective*** article "SBA Adopts 2012 NAICS for Small Business Size Standards"). Among the new industry codes were five renewable electric power generation industries which had been lumped into NAICS 221119, Other Electric Power Generation: NAICS 221114, Solar Electric Power Generation; NAICS 221115, Wind Electric Power Generation; NAICS 221116, Electric Power Generation; NAICS 221117, Biomass Electric Power Generation; and NAICS 221118, Other Electric Power Generation. With the incorporation of these five new industries, NAICS 221119 was deleted from NAICS 2012. Therefore, SBA has deleted NAICS 221119 from its small business size standards.

Regarding Sector 23, 25 respondents submitted comments on the proposed changes. In response to those comments, SBA has decided to increase the size standard for Dredging and Surface Cleanup Activities, a sub-industry category ("exception") under NAICS 237990, Other Heavy and Civil Engineering Construction, from $20 million to $25.5 million instead of to $30.0 million as proposed.

The following are the industries, their previous small business size standards, the proposed changes to those small business size standards, and the revised small business size standards:

NAICS Code	Industry Title	Previous Size Standard ($ million except where otherwise noted)	Proposed Size Standard ($ million except where otherwise noted)	Revised Size Standard ($ million except where otherwise noted)
Sector 22				
221111	Hydroelectric Power Generation	4 million megawatt hours	500 employees	500 employees
221112	Fossil Fuel Electric Power Generation	4 million megawatt hours	500 employees	750 employees
221113	Nuclear Electric Power Generation	4 million megawatt hours	500 employees	750 employees
221114	Solar Electric Power Generation	4 million megawatt hours*	–	250 employees

221115	Wind Electric Power Generation	4 million megawatt hours*	–	250 employees
221116	Geothermal Electric Power Generation	4 million megawatt hours*	–	250 employees
221117	Biomass Electric Power Generation	4 million megawatt hours*	–	250 employees
221118	Other Electric Power Generation	4 million megawatt hours*	–	250 employees
221119	Other Electric Power Generation	4 million megawatt hours	500 employees	–
221121	Electric Bulk Power Transmission and Control	4 million megawatt hours	500 employees	500 employees
221122	Electric Power Distribution	4 million megawatt hours	500 employees	1,000 employees
221310	Water Supply and Irrigation Systems	$7.0	$25.5	$25.5
221320	Sewage Treatment Facilities	$7.0	$19.0	$19.0
221330	Steam and Air-Conditioning Supply	$12.5	$14.0	$14.0
Sector 23				
237210	Land Subdivision	$7.0	$25.5	$25.5
237990	Other Heavy and Civil Engineering Construction			
Except	Dredging and Surface Cleanup Activities	$20.0	$30.0	$25.5

*Industries that were incorporated after the proposed rule was published.

For more on the proposed rules, see the August 2012 ***Federal Contracts Perspective*** article "Changes to 27 Size Standards Proposed."

SBA WAIVES NONMANUFACTURING RULE FOR OVENS

The Small Business Administration (SBA) is waiving the nonmanufacturer rule for Commercial-Type Ovens, Gas Ranges, and Ranges, Product Service Code (PSC) 7310 (Food Cooking, Baking, and Serving Equipment), under the North American Industry Classification System (NAICS) code 333318, Other Commercial and Service Industry Machinery Manufacturing). SBA invited the public to comment on the proposed waiver or to provide information on potential small business sources for these products. Two comments were received supporting the waiver, and the SBA used the Dynamic Small Business Search (DSBS) database (**http://dsbs.sba.gov**) to conduct independent market research that did not reveal any small business manufacturers that participated in the federal market during the previous 24 months. Therefore, SBA has determined that there are no small business manufacturers of this class of

products, and it is granting the nonmanufacturing rule waiver. For more on the proposed nonmanufacturing rule waiver, see the June 2013 ***Federal Contracts Perspective*** article "SBA Proposes Waiving Nonmanufacturing Rule for Ovens."

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/sites/default/files/NMR CLASS WAIVER LIST-AS OF 12-31-2013-VERSION 10.pdf**.

HIGHER-LEVEL CONTRACT QUALITY REQUIREMENTS PROPOSED

According to a proposed rule, FAR 46.202-4, Higher-Level Contract Quality Requirements, would be amended to clarify when to use higher-level quality standards in solicitations and contracts, and to update the examples of higher-level quality standards by revising obsolete standards and adding two new industry standards that pertain to quality assurance for avoidance of counterfeit items. These standards will be used to help minimize and mitigate counterfeit items or suspect counterfeit items in government contracting.

Section 818 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81), "Detection and Avoidance of Counterfeit Electronic Parts," requires DOD to issue regulations addressing contractor responsibilities for detecting and avoiding the use or inclusion of counterfeit electronic parts or suspect counterfeit electronic parts. However, because of the globalization of the marketplace, the problem of counterfeits extends far beyond DOD and electronic parts, posing a supply chain challenge to both government and industry. Globalization raises the risk because of the variations in laws related to commerce and fragments the quality assurance process.

To implement Section 818, the following changes would be made by this rule:

- FAR 44.303, Contractors' Purchasing Systems Review, would be revised to add "implementation of higher-level quality standards" to the areas for evaluation when conducting a contractor's purchasing system review (new paragraph (k)).

- FAR 46.202-4(a) would be revised to add the following sentence: "Agencies shall establish procedures for determining when higher-level contract quality requirements are necessary, for determining the risk (both the likelihood and the impact) of receiving nonconforming items, and for advising the contracting officer about which higher-level standards should be applied and included in the solicitation and contract."

- FAR 46.202-4(a)(1) would be revised to add "design" and "testing" to the list of examples of technical requirements requiring control. Paragraph (a)(1) would read that higher-level quality standards would be appropriate in technical contracts that require "Control of such

things as *design*, work operations, in-process controls, *testing*, and inspection" (emphasis added).

- FAR 46.202-4(b) would be revised to remove outdated or obsolete standards and add new examples of higher-level quality standards, including those related to counterfeit electronic parts and materials (the standards would be ISO 9001, ASQ E, ASME NQA-1, SAE AS9100, SAE AS9003, SAE AS5553, and SAE AS6174). This list of standards was reviewed and revised based on subject matter experts in quality assurance from across the government.

- FAR 46.311, Higher-level Contract Quality Requirement, would be revised to clarify that, if the clause FAR 52.246-11, Higher-Level Contract Quality Requirement, is used, the contracting officer will list one or more higher-level quality standards that will apply to the contract.

- FAR 52.246-11 would be revised to remove the opportunity for the offeror to select a standard ("If more than one standard is listed, the offeror shall indicate its selection by checking the appropriate block" would be replaced with "Contracting Officer insert the title, number, date, and tailoring [if any] of the higher-level quality standards").

Comments on this proposed rule must be submitted no later than February 3, 2014, identified as "FAR Case 2012-032," 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), ATTN: Hada Flowers, 1800 F Street NW, 2nd Floor, Washington, DC 20405-0001.

OFPP REVISES VALUE ENGINEERING GUIDANCE

The Office of Federal Procurement Policy (OFPP) is finalizing, with changes, the revisions it proposed to Office of Management and Budget (OMB) Circular A-131, Value Engineering, to clarify the role of value engineering (VE) in helping agencies meet 21st century demands and deliver better value to the taxpayer. (**EDITOR'S NOTE:** VE is addressed in FAR part 48, Value Engineering.)

In June 2012, OFPP proposed the following significant revisions to OMB Circular A-131:

- Section 4, Overview, would reflect present-day buying strategies and practices by explaining that VE can be used with other management improvement tools, such as lean six sigma, and clarifying that consideration of VE should not exclude services, such as those acquired with performance-based specifications, and construction, including projects where design-build methods are used.

- In Section 8, Agency Responsibilities, the threshold for considering the application of VE would be adjusted from $1,000,000 to $2,000,000, primarily to take into account inflation.

- In Section 9, Reports to OMB, the number of projects on which agencies would be required to report to OMB would be changed from 20 to 5. In addition, it would be revised to update

the reporting format to include a description of the methodology used to calculate savings, and would eliminate requirements for a detailed cost summary of program results from inception to date.

- Section 10, Inspectors General Audits, which requires agency inspectors general (IGs) to conduct an automatic audit of VE programs every two years, would be removed.

Thirteen respondents submitted comments on the proposed A-131 revisions. In response to those comments, the following changes and additional refinements are made to the final version:

- Section 4, Overview, and Section 5, Background, are combined into a single Section 4, Background, that emphasizes the reasons for VE (going back to its implementation during World War II).

- To Section 5, Definitions (proposed Section 6), is added a definition of "value engineering study" to recognize that VE may be tailored and scaled based on factors such as the cost or complexity of the project, the stage in the project lifecycle, and project schedule.

- To Section 5 is added a definition of "value engineering" that clarifies VE is a process "generally performed in a workshop environment by a multidisciplinary team of contractor and/or in-house agency personnel (such as an IPT [integrated project team]), which is facilitated by agency or contractor staff that is experienced, trained and/or certified in leading VE teams through the following phases: (1) information phase…(2) functional analysis phase…(3) creative phase…(4) evaluation phase…(5) development and presentation phase…; and (6) implementation phase."

- Section 7, Agency Responsibilities (proposed Section 8), is revised to direct agencies to identify a senior accountable official (SAO) responsible for ensuring the appropriate consideration and use of VE, including maintaining agency guidelines and procedures for identifying agency programs and projects with the most potential to yield savings from VE studies and reporting results to OMB.

- Section 7 is revised to grant agencies the discretion to determine the extent to which VE shall be applied to existing projects and programs, but agencies are required to establish criteria to help agency managers determine when VE may be suitable. In addition, documentation must be maintained to explain the basis of waivers and, where VE studies are conducted, the reason for not implementing recommendations made in the studies.

- In Section 8, Reports to OMB (proposed Section 9), the threshold for considering VE for new projects and programs is increased to $5,000,000. The original A-131 has established $1,000,000 as the threshold, and the proposed change was to $2,000,000. OFPP decided to increase the threshold to $5,000,000 in recognition that the application of VE has the greatest value early in the investment lifecycle on high dollar programs and projects.

- New Section 10, Relationship to Other Management Improvement Processes (formerly part of proposed Section 4), is added, and it emphasizes that VE can also be used with acquisition

and commodity management techniques, such as strategic sourcing and modular contracting, to improve performance and quality, lower cost, manage risks more effectively, and shorten project delivery.

For more on the proposed revisions to OMB Circular A-131, see the July 2012 ***Federal Contracts Perspective*** article "OFPP Proposes Value Engineering Revisions."

OFPP REFRESHES PM CERTIFICATION PROGRAM

Joseph Jordan, OFPP Administrator, has issued a memorandum to all chief acquisition officers (CAO) and senior procurement executives (SPE) announcing the refreshment and improvement of the Federal Acquisition Certification for Program and Project Managers (FAC-P/PM).

The initial FAC-P/PM was issued in April 2007 (see the May 2007 ***Federal Contracts Perspective*** article "Certification Required for Program Managers of Major Acquisitions"). The revisions are intended to strengthen civilian agency P/PMs to improve program outcomes, and they reflect the need to improve the management of high-risk, high-impact programs.

The following are the changes that have been made to strengthen the P/PM workforce:

FAC-P/PM of April 25, 2007	Refreshed FAC-P/PM
Applicability:	
At a minimum, P/PMs assigned to programs considered major acquisitions must be senior-level certified.	All acquisition P/PMs must be certified at the appropriate level, as determined by their agency. Considerations for determining the appropriate level have been added.
Allowability of Waivers:	
The CAO could waive all or part of the FAC-P/PM requirements.	Extensions to the required certification date by the CAO are allowed, but waivers are not.
Competencies:	
Competencies were provided for each certification level.	Competencies have been updated for each of the three certification levels, and performance outcomes for competencies at each level have been defined, which better describes the required knowledge, skills and abilities needed for successful performance.
Training Requirements:	
Inflexible minimum hours of training and learning outcomes areas were tied to various functional areas.	Training requirements are more flexible with requirements ranging from approximately 80 to 120 hours collectively for each of the three levels, depending upon the instructional design and method of training delivery. Training can be tailored more to the individual and his/her competency gaps. Performance outcomes have been added.

Training Classes:	
FAI developed a P/PM training blueprint to guide P/PM candidates to appropriate training vendors and classes.	FAI has developed and identified more certification training making it easier for agencies and P/PM candidates to determine which classes are available. Sample curricula are provided along with various training options from the Federal Acquisition Institute (FAI), the Defense Acquisition University (DAU), the Department of Veterans Affairs (VA) Acquisition Academy, and commercial vendors.
Senior-Level Experience:	
Senior/expert P/PMs were required to have four years of program and project management experience on Federal projects and/or programs.	Senior-level P/PMs are required to have four years of program and project management experience, which shall include a minimum of one year of experience on federal programs and/or projects, within the last ten years. This experience can be obtained as either a federal employee or a contractor.
Core-Plus Specialized Certification:	
None available.	General core-plus requirements have been added to the core FAC-P/PM certification along with specific requirements for a core-plus information technology (IT) certification.
Management Information System:	
The Acquisition Career Management Information System (ACMIS) was the official system of records for the FAC-P/PM program.	The Federal Acquisition Institute Training Application System (FAITAS) is the official system of records for the FAC-P/PM program. All acquisition P/PMs are required to be registered in FAITAS by January 1, 2014.

Those with questions or suggestions regarding the FAC-P/PM program should contact Joanie Newhart at 202-395-4821 or email: **jnewhart@omb.eop.gov**.

GOVERNMENT PROPERTY PROVISION, CLAUSE ADDED TO DOSAR

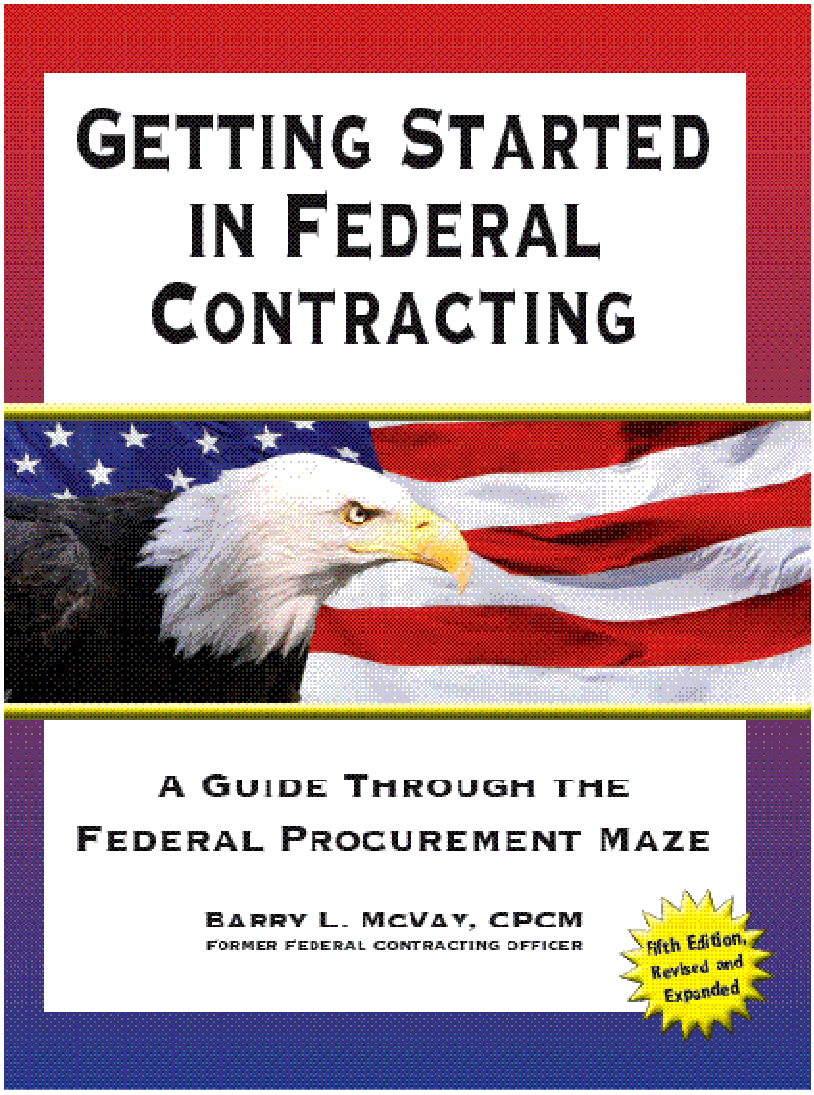
The Department of State (DOS) is finalizing, with changes, the proposed addition of provision DOS Acquisition Regulation (DOSAR) 652.245-70, Status of Property Management System, and clause DOSAR 652.245-71, Special Reports of Government Property, to conform to changes made to the FAR since the last update to DOSAR part 645, Government Property, in 1999 (see the June 2007 ***Federal Contracts Perspective*** article "FAR Coverage on Government Property Simplified, Clarified, Trimmed," and the April 2012 ***Federal Contracts Perspective*** article "FAC 2005-56 Finalizes Rules on Women-Owned Business Set-Asides, Use of Cost-Reimbursement Contracts").

The proposed DOSAR 652.245-70 would request information from offerors regarding their property management systems to comply with paragraph (c) of FAR 45.201, Solicitation [where government-furnished property is anticipated], which states that the solicitation shall require all offerors to submit a description of the offeror's property management system, plan, and any customary commercial practices, voluntary consensus standards, or industry-leading practices and standards to be used by the offeror in managing government property.

The proposed DOSAR 652.245-71 would be required in all solicitations and contracts than contain DOSAR 652.245-70, and it would require the contractor to establish and maintain a property management system that is in accordance with FAR 52.245-1, Government Property. The contractor would be required to submit one annual report and three quarterly reports electronically in the format specified in paragraph (d) of the clause, which requires 19 data elements on each unit of property, to each of the individuals identified in paragraph (i) of the clause.

Two respondents submitted comments on the proposed rule and, as a result, several editorial changes have been made to the final rule.

For more on the proposed rule, see the August 2013 ***Federal Contracts Perspective*** article "State Proposes Government Property Clauses."



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