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FAC 2005-88 REQUIRES SAFEGUARDS OF CONTRACTOR INFORMATION SYSTEMS

Federal Acquisition Circular (FAC) 2005-88 revises the Federal Acquisition Regulation (FAR) to impose standard safeguards protecting federal information residing or passing through contractors' information systems. In addition, FAC 2005-88 amends the FAR to require the procurement of alternatives to high global warming potential hydrofluorocarbons whenever feasible, addresses phase-two proposals for a two-phase design-build construction acquisition, and amends the definition of "simplified acquisition threshold" (SAT) to correct the omission of the higher SAT for overseas acquisitions in support of humanitarian or peacekeeping operations.

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■ **Basic Safeguarding of Contractor Information Systems:** This finalizes, with changes, the proposed rule that would add a new FAR subpart 4.19, Basic Safeguarding of Covered Contractor Information Systems, and a corresponding clause, FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems, to require basic safeguarding of contractor information systems that process, store, or transmit federal contract information. This rule focuses on ensuring a basic level of safeguarding for any contractor system with federal information, and is reflective of actions a prudent business person would employ.

FAR 52.204-21 is to be included in all solicitations and contracts, including acquisitions of commercial items other than commercially available off-the-shelf items, when a contractor's or a subcontractor's information system may have federal contract information residing in or transiting through its information system. "Federal contract information" is defined as "information, not intended for public release, that is provided by or generated for the government under a contract to develop or deliver a product or service to the government, but not including information provided by the government to the public (such as on public websites) or simple transactional information, such as necessary to process payments."

The following are the required safeguarding requirements and procedures:

– Limit information system access to authorized users, processes acting on behalf of authorized users, or devices (including other information systems).

– Limit information system access to the types of transactions and functions that authorized users are permitted to execute.

- Verify and control/limit connections to and use of external information systems.
- Control information posted or processed on publicly accessible information systems.
- Identify information system users, processes acting on behalf of users, or devices.
- Authenticate (or verify) the identities of those users, processes, or devices, as a prerequisite to allowing access to organizational information systems.
- Sanitize or destroy information system media containing federal contract information before disposal or release for reuse.
- Limit physical access to organizational information systems, equipment, and the respective operating environments to authorized individuals.
- Escort visitors and monitor visitor activity; maintain audit logs of physical access; and control and manage physical access devices.
- Monitor, control, and protect organizational communications (that is, information transmitted or received by organizational information systems) at the external boundaries and key internal boundaries of the information systems.
- Implement subnetworks for publicly accessible system components that are physically or logically separated from internal networks.
- Identify, report, and correct information and information system flaws in a timely manner.
- Provide protection from malicious code at appropriate locations within organizational information systems.
- Update malicious code protection mechanisms when new releases are available.
- Perform periodic scans of the information system and real-time scans of files from external sources as files are downloaded, opened, or executed.

Sixteen respondents submitted comments on the proposed rule. Among the more significant changes made to the final rule are the following:

- The term "covered" is added to "contractor information system" throughout the final rule to clarify that the policy applies only to contractor information systems that contain federal contract information. In addition, a definition for "covered contractor information system" is added ("an information system that is owned or operated by a contractor that processes, stores, or transmits federal contract information").

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– The definitions for "covered contractor information system" and "federal contract information" are added, and all other proposed definitions are deleted except the definitions for "information," "information system," and "safeguarding."

– The safeguarding requirements and procedures in the clause that relate to transmitting electronic information, transmitting voice and fax information, and information transfer limitations are deleted.

– The clause must be included in solicitations and contracts below the simplified acquisition threshold ($150,000). The proposed clause was to be included in solicitations and contracts only above the simplified acquisition threshold.

For more on the proposed rule, see the September 2012 ***Federal Contracts Perspective*** article "Two FAR Changes Proposed."

■ **High Global Warming Potential Hydrofluorocarbons:** This finalizes, with changes, the proposal to revise FAR subpart 23.8, Ozone-Depleting Substances and Hydrofluorocarbons, and the corresponding clauses to implement President Obama's Climate Action Plan (CAP), which requires the procurement, when feasible, of alternatives to high global warming potential (GWP) hydrofluorocarbons (HFCs).

The proposed rule would have made the following changes:

– Amend FAR 2.101, Definitions, to add definitions for "global warming potential," "hydrofluorocarbons," and "high global warming potential hydrofluorocarbons."

– Add FAR 23.802, Policy, which would state that it is the government's policy that agencies "implement cost-effective programs to minimize the procurement of materials and substances that contribute to the depletion of stratospheric ozone and/or result in the use, release, or emission of emission of high global warming potential hydrofluorocarbons; and give preference to the procurement of acceptable alternative chemicals, products, and manufacturing processes that reduce overall risks to human health and the environment by minimizing (1) the depletion of ozone in the upper atmosphere; and (2) the potential use, release, or emission of high global warming potential hydrofluorocarbons."

– Change the title of FAR 23.803 from "Policy" to "Procedures, and add the following: "[Agencies shall:] (c) specify, when feasible, that contractors shall substitute acceptable lower global warming potential alternatives for high global warming potential hydrofluorocarbons in products and services; and (d) refer to [Environmental Protection Agency's] Significant New Alternatives Policy (SNAP) program (available at **http://www.epa.gov/ozone/snap**) to identify acceptable alternatives to ozone-depleting substances and high global warming potential hydrofluorocarbons."

– Amend FAR 52.223-11, Ozone-Depleting Substances and High Global Warming Potential Hydrofluorocarbons, and FAR 52.223-12, Maintenance, Service, Repair, or Disposal of Refrigeration Equipment and Air Conditioners, to address high GWP HFCs as well as ozone-depleting substances.

– Add FAR 52.223-20, Aerosols, and FAR 52.223-21, Foams, to address the use of alternatives, where feasible, in place of high GWP HFCs in aerosol cans (as propellants or solvents) and as foam blowing agents.

Sixteen respondents submitted comments on the proposed rule. In response, the following changes are made to the final rule:

– In FAR 2.101, the definition of "high global warming potential hydrofluorocarbons" is amended to specify that the term means "any hydrofluorocarbons *in a particular end use* for which EPA's Significant New Alternatives Policy (SNAP) program has identified other acceptable alternatives that have lower global warming potential" (*italicized* words are added).

– FAR 23.000, Scope, which was to be amended to state that FAR part 23, Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace, now covers "non-ozone-depleting products, and products and services that minimize or eliminate, when feasible, the use, release, or emission of high global warming potential hydrofluorocarbons", is amended to add to the end "such as by using reclaimed instead of virgin hydrofluorocarbons."

– FAR 23.804, Contract Clauses, which provides the prescriptions for the clauses that address ozone-depleting substances and hydrofluorocarbons, states that the clauses are to be included as prescribed "except for contracts that will be performed outside the United States and its outlying areas." This is clarified by changing the language to require the inclusion of the clauses "except for contracts for supplies that will be delivered outside the United States and its outlying areas, or contracts for services that will be performed outside the United States and its outlying areas."

– Both FAR 52.223-20 and FAR 52.223-21 are amended to add the environmental, technical, and economic factors a contractor is to consider when determining the feasibility of using a particular alternative.

For more on the proposed rule, see the June 2015 ***Federal Contracts Perspective*** article "FAC 2005-82 Finalizes Three Rules."

For more proposed changes to FAR subpart 23.8, see the next article.

■ **Improvement in Design-Build Construction Process:** This finalizes, with a change, the rule that proposed to amend FAR subpart 36.3, Two-Phase Design-Build Selection Procedures, to implement Section 814 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), which requires the head of the contracting activity to approve any determinations to select more than five offerors to submit phase-two proposals for a two-phase design-build construction acquisition that is valued at greater than $4,000,000.

FAR 36.303-1, Phase One, specifies that solicitations covering phase one must contain "a statement of the maximum number of offerors that will be selected to submit phase-two proposals. The maximum number specified shall not exceed five unless the contracting officer determines, for that particular solicitation, that a number greater than five is in the government's

interest and is consistent with the purposes and objectives of two-phase design-build contracting."

Section 814 adds the requirement that "if the contract value exceeds $4,000,000, the maximum number specified in the solicitation shall not exceed 5 unless the head of the contracting activity, delegable to a level no lower than the senior contracting official within the contracting activity, approves the contracting officer's justification with respect to an individual solicitation that a number greater than 5 is in the federal government's interest. The contracting officer shall provide written documentation of how a maximum number exceeding 5 is consistent with the purposes and objectives of the two-phase selection procedures."

To implement Section 814, the proposed rule would amend FAR 36.303-1(a)(4) to add the following to the end of the paragraph: "The contracting officer shall document this determination in the contract file. For acquisitions greater than $4 million, the determination shall be approved by the head of the contracting activity, delegable to a level no lower than the senior contracting official within the contracting activity."

Five respondents submitted comments on the proposed rule, and in response the following two sentences are added to the end of paragraph (a)(4): "In civilian agencies, for this paragraph (a)(4), the senior contracting official is the advocate for competition for the procuring activity, unless the agency designates a different position in agency procedures. The approval shall be documented in the contract file."

For more on the proposed rule, see the November 2015 ***Federal Contracts Perspective*** article "Three FAR Rules Proposed."

■ **Simplified Acquisition Threshold for Overseas Acquisitions in Support of Humanitarian or Peacekeeping Operations:** This finalizes, without changes, the proposal to amend the definition of "simplified acquisition threshold" (SAT) in FAR 2.101, Definitions, to correct the inadvertent omission of the higher SAT for overseas acquisitions in support of humanitarian or peacekeeping operations.

Prior to 2004, the SAT definition had a separate threshold for overseas humanitarian or peacekeeping missions. However, Federal Acquisition Circular (FAC) 2001-20 consisted of an interim rule that amended the SAT definition in FAR 2.101 to implement the special emergency procurement authorities of Section 1443 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136) (see the March 2004 ***Federal Contracts Perspective*** article "FAC 2001-20 Implements Emergency Purchasing Authority"). In doing so, the SAT threshold for overseas acquisitions in support of humanitarian or peacekeeping operations was inadvertently removed. Therefore, it was proposed that the following be added to FAR 2.101: "[For] acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a humanitarian or peacekeeping operation (41 USC 153 and 10 USC 2302), the [SAT] term means $300,000 for any contract to be awarded and performed, or purchase to be made, outside the United States."

One comment was received in response to the proposed rule, but no changes were made in response to the comment. For more on the proposed rule, see the November 2015 ***Federal Contracts Perspective*** article "Three FAR Changes Proposed."

FOUR MORE FAR RULES PROPOSED

The FAR Council has been resting during the first third of the year, only issuing three proposed rules. Now it appears to be rousing itself, proposing four FAR rule changes during May.

■ **Combating Trafficking in Persons – Definition of "Recruitment Fees":** This proposed rule would amend FAR subpart 22.17, Combating Trafficking in Persons, and FAR 52.222-50, Combating Trafficking in Persons, to add a definition of "recruitment fees" that is both effective in reinforcing the prohibition on recruitment fees and is understandable and manageable for contractors.

Both paragraph (a)(6) of FAR 22.1703, Policy, and paragraph (b)(6) of FAR 52.222-50 prohibit contractors, contractor employees, subcontractors, subcontractor employees, and their agents from charging employees recruitment fees. However, neither FAR 22.1702, Definitions, nor FAR 52.222-50 contain a definition of "recruitment fees." This blanket prohibition of "recruitment fees" can be construed as prohibiting many legitimate business practices, such as recruiters charging reasonable job placement fees to the individual who is being placed in a job, resumé writing, transportation to job fairs, and interview technique counseling. Therefore, the following definition of "recruitment fees" is proposed to be added to FAR 22.1702 and FAR 52.222-50:

> "Recruitment fees include, but are not limited to, fees, charges, costs, assessments, or other financial obligations assessed against employees or potential employees, associated with the recruiting process, regardless of the manner of their imposition or collection:
>
> (i) For soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, testing, training, providing new-hire orientation, recommending, or placing employees or potential employees;
> (ii) For covering the cost, in whole or in part, of advertising;
> (iii)For any activity related to obtaining permanent or temporary labor certification;
> (iv)For processing petitions;
> (v) For visas and any fee that facilitates an employee obtaining a visa such as appointment and application fees;
> (vi)For government-mandated costs such as border crossing fees;
> (vii) For procuring photographs and identity documentation, including any nongovernmental passport fees;
> (viii) Charged as a condition of access to the job opportunity, including procuring medical examinations and immunizations and obtaining background, reference and security clearance checks and examinations; additional certifications;
> (ix)For an employer's recruiters, agents or attorneys, or other notary or legal fees; and
> (x) For language interpreters or translators."

The definition goes on to provide that "any fee, charge, cost, or assessment may be a recruitment fee regardless of whether the payment is in property or money, deducted from wages, paid back in wage or benefit concessions, paid back as a kickback, bribe, in-kind payment, free labor, tip, or tribute, remitted in connection with recruitment, or collected by an

employer or a third party, including, but not limited to: (i) agents; (ii) recruiters; (iii) staffing firms (including private employment and placement firms); (iv) subsidiaries/affiliates of the employer; (v) any agent or employee of such entities; and (vi) subcontractors at all tiers."

Comments on this proposed rule must be submitted no later than July 11, 2016, identified as "FAR Case 2015-017," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Ms. Flowers, 1800 F Street NW, 2nd Floor, Washington, DC 20405. In particular, comments are sought on the following questions:

- Are all costs/fees associated with bringing an employee on board properly treated as recruitment fees?
- Are there any additional charges that should be considered recruitment fees?
- Should the definition of a recruitment fee vary depending on whether the job is a professional high-paying, high-skill job or an unskilled, low-paying job? Is the location of the job a factor?
- Are the boundaries (that is, limitations) of the proposed definition clear? If not, what changes would make the limitations clearer?
- As a general matter, is the illustrative list of recruitment fees helpful in understanding what costs an employee may not be charged? If not, why not?
- What, if any, of the specifically enumerated fees in the proposed definition should be excluded and why?
- What, if any, of the specifically enumerated fees not included in the proposed definition should be added?

■ **Administrative Cost to Issue and Administer a Contract:** This proposed rule would revise paragraph (c) of FAR 14.201-8, Price Related Factors, and FAR 52.214-22, Evaluation Factors for Multiple Awards, to revise the estimated administrative cost to award and administer a contract from $500 to $1,000 when evaluating bids for multiple awards.

FAR 52.214-22 was issued in March 1990, and it states, "It is assumed, for the purpose of evaluating bids, that $500 would be the administrative cost to the government for issuing and administering each contract awarded under this solicitation, and individual awards will be for the items or combinations of items that result in the lowest aggregate cost to the government, including the assumed administrative costs."

Based on inflation since 1990 (see the Consumer Price Index [CPI] calculator at **http://data.bls.gov/cgi-bin/cpicalc.pl**), the $500 figure should be increased to $1,000. Therefore, this proposed rule would revise FAR 14.201-8(c) and FAR 52.214-22 accordingly.

Comments on this proposed rule must be submitted no later than July 11, 2016, identified as "FAR Case 2016-003," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) mail: General Services Administration, Regulatory

Secretariat (MVCB), ATTN: Ms. Flowers, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

■ **System for Award Management Registration:** This proposed rule would revise FAR 4.1102, Policy [for System for Award Management [SAM] registration], and FAR 4.1103, Procedures [for SAM registration], to correct an inconsistency in when an offeror must register in SAM (**https://www.sam.gov**) – prior to submitting an offer or prior to award.

According to FAR 52.204-7, System for Award Management, an offeror is not "registered in the SAM database" unless "the offeror has completed the Core, Assertions, and Representations and Certification, and Points of Contact sections of the registration in the SAM database." Furthermore, paragraphs (b) and (d) of FAR 52.204-8, Annual Representations and Certifications, state that if FAR 52.204-7 is included in the solicitation, then the offeror verifies by submission of the offer that its representations and certifications in SAM are current and accurate. This means the offeror must have already completed its representations and certifications in SAM prior to the submission of its offer.

However, FAR 4.1102(a) states, "Prospective contractors shall be registered in the SAM database prior to award of a contract or agreement…" Therefore, it is proposed that both FAR 4.1102(a) and paragraph (a)(1) of FAR 4.1103 (which requires the contracting officer to "verify that the prospective contractor is registered in the SAM database…before awarding a contract or agreement") be revised to require offeror registration in SAM prior to submission of an offer.

Also, the proposed rule would change "**acquisition.gov**" to "**SAM.gov**" throughout the FAR for consistency. Finally, "database" would be added to "SAM" throughout the FAR so it is clearly understood that the reference is to the "SAM database".

Comments on this proposed rule must be submitted no later than July 19, 2016, identified as "FAR Case 2015-005," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Ms. Flowers, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

■ **Public Disclosure of Greenhouse Gas Emissions and Reduction Goals:** This proposed rule would revise FAR subpart 23.8, Ozone-Depleting Substances and Hydrofluorocarbons, and add FAR 52.223-ZZ, Public Disclosure of Greenhouse Gas Emissions and Reduction Goals – Representation, to create an annual representation within the SAM for offerors to indicate if and where they publicly disclose greenhouse gas (GHG) emissions and GHG reduction goals or targets.

Public disclosure of GHG emissions and reduction goals or targets has become standard practice in many industries, and companies are increasingly asking their own suppliers about their GHG management practices. Performing a GHG inventory provides insight into operations, spurs innovation, and helps identify opportunities for efficiency and savings that can result in both environmental and financial benefits. By asking suppliers whether or not they publicly report emissions and reduction targets, the government will have accurate, up-to-date information on its suppliers. An annual representation will promote transparency and demonstrate the government's commitment to reducing supply chain emissions.

Therefore, this proposed rule would add FAR 52.223-ZZ for offerors to indicate if and where they publicly disclose GHG emissions and GHG reduction goals or targets. This representation would be mandatory only for offerors who received $7,500,000 or more in federal contract

awards in the preceding fiscal year. However, this representation would apply to those offerors even for acquisitions under the simplified acquisition threshold ($150,000), for commercial items, and for commercial off-the-shelf items.

The representation would be in two parts:

(i) "The offeror (itself or through its immediate owner or highest-level owner) publicly [ ] does, [ ] does not disclose greenhouse gas emissions, *i.e.,* makes available on a publicly accessible website the results of a greenhouse gas inventory, performed in accordance with the Greenhouse Gas Protocol Corporate Standard or equivalent standard. A publicly accessible website includes the supplier's own website or via a recognized, third-party greenhouse gas emissions reporting program."

(ii) "The offeror (itself or through its immediate owner or highest-level owner) [ ] does, [ ] does not disclose a quantitative greenhouse gas emissions reduction goal, *i.e*., a target to reduce absolute emissions or emissions intensity by a specific quantity or percentage."

The same representation would be included as paragraph (s) of FAR 52.212-3, Offeror Representations and Certifications – Commercial Items.

In addition, the proposed rule would amend FAR 23.001, Definitions, to add "nitrogen trifluoride" to the definition of "greenhouse gases."

Comments on this proposed rule must be submitted no later than July 25, 2016, identified as "FAR Case 2015-024," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Ms. Flowers, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

DEFENSE ROUSES ITSELF

After a sleepy April, the Department of Defense (DOD) decided that May was the time to resume revising the Defense FAR Supplement (DFARS), issuing five final rules, two proposed rules, and one class deviation.

■ **Long-Haul Telecommunications:** This finalizes, without changes, the rule that proposed to: (1) amend DFARS 239.7401, Definitions [for telecommunications services], to add the following definition of "long-haul telecommunications": "all general and special purpose long-distance telecommunications facilities and services (including commercial satellite services, terminal equipment and local circuitry supporting the long-haul service) to or from the post, camp, base, or station switch and/or main distribution frame (except for trunk lines to the first-serving commercial central office for local communications services)"; and (2) amend DFARS 239.7402, Policy, to add paragraph (d), which would identify the Defense Information Systems Agency as the sole procurement activity for long-haul telecommunications requirements for DOD as addressed in DOD Directive 5105.19, Defense Information Systems Agency, by referencing Procedures, Guidance, and Information (PGI) 239.7402(d).

No comments were submitted in response to the proposed rule, so it is finalized without changes. For more on the proposed rule, see the December 2015 ***Federal Contracts Perspective*** article "DOD Picks Up Pace of Revisions to DFARS."

■ **Multiyear Contract Requirements:** This finalizes, without changes, the proposal to amend DFARS subpart 217.1, Multiyear Contracting, to implement Section 816 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291) and Section 8010 of the Department of Defense Appropriations Act for Fiscal Year 2015 (Public Law 113-235), which address various requirements for multiyear contracts.

Section 816 clarifies that a multiyear contract may not be entered into for a defense acquisition program that has been specifically authorized by law to be carried out using multiyear contract authority unless the Secretary of Defense certifies in writing, not later than 30 days before entry into the contract, that certain conditions have been met.

Section 8010 makes the following additional changes:

- A multiyear contract may not be terminated without 30-day prior notification to the congressional defense committees.

- A multiyear contract may not be entered into unless the head of the agency ensures that:

  - Cancellation provisions in the contract do not include consideration of recurring manufacturing costs of the contractor associated with the production of unfunded units to be delivered under the contract;

  - The contract provides that payments to the contractor under the contract shall not be made in advance of incurred costs on funded units; and

  - The contract does not provide for a price adjustment based on a failure to award a follow-on contract.

To implement Section 816 and Section 8010, the following changes were proposed to DFARS subpart 217.1:

- Amend paragraph (b) of DFARS 217.170, General, to change "10 days before termination of any multiyear contract" to "30 days before termination of any multiyear contract."

- Amend paragraph (e) of DFARS 217.172, Multiyear Contracts for Supplies, to add the new Section 8010 requirements for multiyear contracts to the list of requirements.

- Revise DFARS 217.172(h) to clarify that the requirements are applicable to defense acquisition programs specifically authorized by law to be carried out using multiyear contract authority; to require the Secretary of Defense to certify to Congress by no later than "30 days before entry" into a contract, instead of no later than "March 1 of the year in which the Secretary requests legislative authority to enter" in such contract; and delete

paragraph (h)(7), which requires a notification to congressional defense committees 30 days prior to award of a multiyear contract.

No comments were submitted in response to the proposed rule, so it is finalized without changes. For more on the proposed rule, see the January 2016 ***Federal Contracts Perspective*** article "DOD Addresses Acquisition Policies Outside the U.S."

■ **Duty-Free Entry Threshold:** This finalizes, without changes, the proposal to revise paragraph (3) of DFARS 225.901, Policy [on customs and duties], and paragraph (b)(3) of DFARS 252.225-7013, Duty-Free Entry, to increase the duty-free entry threshold on nonqualifying country supplies and ineligible foreign supplies from $200 to $300. The $200 threshold was established on April 30, 2003, based on the estimated cost to process a duty-free entry certificate at the time. To reflect inflation since 2003, it was proposed to increase the threshold to $300.

No comments were submitted in response to the proposed rule, so it is finalized without changes. For more on the proposed rule, see the December 2015 ***Federal Contracts Perspective*** article "DOD Picks Up Pace of Revisions to DFARS."

■ **Disclosure to Litigation Support Contractors:** This finalizes, with changes, the interim rule that added DFARS subpart 204.74, Disclosure of Information to Litigation Support Contractors, and related clauses to allow DOD litigation support contractors to have access to "sensitive information" provided the litigation support contractor is required to protect that information from any unauthorized disclosure and is prohibited from using that information for any purpose other than providing litigation support services to DOD.

The interim rule implemented Section 802 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81), which authorizes DOD to disclose to a litigation support contractor "confidential commercial, financial, or proprietary information, technical data, or other privileged information" provided the litigation support contractor agrees to and acknowledges "(A) that sensitive information furnished will be accessed and used only for the purposes stated in the relevant contract; (B) that the contractor will take all precautions necessary to prevent disclosure of the sensitive information provided to the contractor; (C) that such sensitive information provided to the contractor under the authority of this section shall not be used by the contractor to compete against a third party for government or non-government contracts; and (D) that the violation of subparagraph (A), (B), or (C) is a basis for the government to terminate the litigation support contract of the contractor."

To implement Section 802, the interim rule added: (1) DFARS subpart 204.74, which reiterates the Section 802 policy; (2) DFARS 252.204-7013, Limitations on the Use or Disclosure of Information by Litigation Support Solicitation Offerors, which is to be included in all solicitations, including those using FAR part 12 procedures for the acquisition of commercial items, that involve litigation support services, and which identifies all the Section 802 limitations; (3) DFARS 252.204-7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors, which specifies all the Section 802 requirements, limitations, and restrictions that apply to the litigation support contractor; and (4) DFARS 252.204-7015, Disclosure of Information to Litigation support Contractors, which notifies all offerors and contractors that information they submit to DOD may be disclosed to litigation support contractors.

Two respondents submitted comments on the interim rule, and two changes were made in the final rule:

- A new paragraph (b)(4) is added to DFARS 252.204-7013 and a new paragraph (b)(5) is added to DFARS 252.204-7014 to clarify that "upon completion of the authorized litigation support activities, the offeror will destroy or return to the government at the request of the contracting officer all litigation information in its possession."

- A new paragraph (b)(2) is added to DFARS 252.204-7014 to clarify that the contractor shall "not disclose litigation information to any entity outside the contractor's organization unless, prior to such disclosure the contracting officer has provided written consent to such disclosure."

For more on the interim rule, see the March 2014 ***Federal Contracts Perspective*** article "DOD Cranks Up DFARS Changes."

■ **Contract Term Limit for Energy Savings Contracts:** This finalizes, with one change, the proposal that DFARS 241.103, Statutory and Delegated Authority [for utility services], be amended to clarify the contract term for contracts awarded under the statutory authority of Title 10 of the U.S. Code, Section 2913, Energy Savings Contracts and Activities (10 USC 2913). 10 USC 2913 requires DOD to "develop a simplified method of contracting for shared energy savings contract services that will accelerate the use of these contracts..." DOD is authorized by 10 USC 2913 to contract with gas and electricity utilities to implement energy conservation measures on military installations. However, 10 USC 2913 does not indicate a term limit for contracts executed under this authority.

The proposal was to add paragraph (2) to DFARS 241.103, which would state "The contracting officer may enter into a shared energy savings contract under 10 USC 2913 for a period not to exceed 25 years." According to the introduction of the proposed rule, "twenty-five years allows a greater volume and variety of energy conservation measures, and is consistent with non-DOD agency practice for similar contracts."

Ten respondents submitted comments on the proposed rule. One respondent stated that 10 USC 2913 applies not only to shared energy savings contracts but also to agreements with gas or electric companies, and recommended removing the reference to shared energy savings contracts. In response, DFARS 241.103(2) is revised to remove the word "shared" from "shared energy savings contracts" so all energy savings contracts under 10 USC 2913 are subject to the to the 25 years limitation.

For more on the proposed rule, see the December 2015 ***Federal Contracts Perspective*** article "DOD Picks Up Pace of Revisions to DFARS."

■ **Rights in Technical Data:** This proposed rule would amend DFARS 227.7103-13, Government Right to Review, Verify, Challenge and Validate Asserted Restrictions, and DFARS 252.227-7037, Validation of Restrictive Markings on Technical Data, to implement Section 813(a) of the National Defense Authorization Act for Fiscal Year (FY) 2016 (Public Law 114-92), which modifies paragraph (f) of 10 USC 2321, Validation of Proprietary Data Restrictions, to address rights in technical data relating to major weapon systems.

DFARS 227.7103-13(c)(2)(ii) and DFARS 252.227-7037(b)(2) address technical data for major systems: "The presumption of development exclusively at private expense does not apply to major systems or subsystems or components thereof, except for commercially available off-the-shelf items…When the contracting officer challenges an asserted restriction regarding technical data for a major system or a subsystem or component thereof on the basis that the technology was not developed exclusively at private expense, the contracting officer shall sustain the challenge unless information provided by the contractor or subcontractor demonstrates that the item was developed exclusively at private expense." This reflects the provisions of 10 USC 2321(f) prior to the amendments made by Section 813(a) of Public Law 114-92.

Section 813(a) expanded the "commercially available off-the-shelf" exception to include three additional exceptions: "(i) with regard to a commercial subsystem or component of a major system, if the major system was acquired as a commercial item…; (ii) with regard to a component of a subsystem, if the subsystem was acquired as a commercial item…; and (iii) with regard to any other component, if the component is a commercially available off-the-shelf item or a commercially available off-the-shelf item with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet federal government requirements…" Therefore, it is proposed that both DFARS 227.7103-13(c)(2)(ii) and DFARS 252.227-7037(b)(2) be amended to add these three exceptions.

Comments on this proposed rule must be submitted no later than July 11, 2016, identified as "DFARS Case 2016-D008," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Amy Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Display of Hotline Posters:** This proposed rule would amend DFARS 252.203-7004, Display of Hotline Posters, to consolidate the multiple hotline posters required by the clause into one poster that delineates multiple reportable offenses.

The clause requires the display of three different posters: (1) a DOD fraud hotline poster; (2) a combating trafficking in persons poster; and (3) a whistleblower protection poster. DOD has consolidated the posters into one poster and proposes updating the clause by changing "These DOD hotline posters may be obtained from…" to "The DOD hotline poster may be obtained from…", and changing "posters are" to "poster is".

In addition, if the contract is funded by the Department of Homeland Security (DHS) disaster relief funds and the work is to be performed in the United States, the DHS fraud hotline poster must also be displayed. Therefore, a paragraph would be added to the clause to provide contact information for obtaining the DHS poster.

Comments on this proposed rule must be submitted no later than July 11, 2016, identified as "DFARS Case 2016-D018," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Christopher Stiller, OUSD(AT&L) DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Class Deviation on Small Business Set-Asides for Religious Related Services:** This class deviation implements Section 898 of the National Defense Authorization Act for Fiscal Year (FY) 2016 (Public Law 114-92), which states, "The Department of Defense may not preclude a non-profit organization from competing for a contract for religious related services on a United States military installation."

For acquisitions of religious related services that are set aside for small businesses, contracting officers are required to include DFARS 252.219-7999, Religious Related Services – Notice of Set-Aside for Small Business Concerns or Nonprofit Organizations (DEVIATION 2016-O0007), instead of FAR 52.219-6, Notice of Total Small Business Concerns Set-Aside.

GSA ADDRESSES UNENFORCEABLE SUPPLIER TERMS

The General Services Administration (GSA) is proposing to amend the GSA Acquisition Regulation (GSAR) to address common commercial supplier agreement terms that are inconsistent with or create ambiguity with federal Law.

Customarily, commercial supplies and services are offered to the public under standard agreements, such as license agreements, terms of service (TOS), End User License Agreements (EULA), and terms of sale or purchase. These standard commercial supplier agreements typically contain terms and conditions that make sense when the purchaser is a private party but are inappropriate when the purchaser is the federal government. Discrepancies between commercial supplier agreements and federal law or the government's needs create recurrent points of inconsistency, and GSA and its contractors must spend significant time and resources to negotiate out these terms. Therefore, GSA is proposing to amend GSAR 552.212-4, Contract Terms and Conditions – Commercial Items (FAR DEVIATION), to add paragraph (w) to FAR 52.212-4 to address the following:

■ *Definition of Contracting Parties:* Contract agreements are between the commercial supplier or licensor and the U.S. government. Government employees or persons acting on behalf of the government will not be bound in their personal capacity by the commercial supplier agreement.

■ *Laws and Disputes:* Many commercial supplier agreements require that disputes be resolved in a particular state or federal court. Clauses that conflict with the sovereign immunity of the U.S. government cannot apply to litigation where the government is a defendant because those disputes must be heard either in U.S. District Court or the U.S. Court of Federal Claims (see 41 USC chapter 71, Contract Disputes). Commercial supplier agreement terms that require the resolution of a dispute in a forum or time period other than that expressly authorized by federal law are deleted. Statutes of limitation on potential claims shall be governed by U.S. government law.

■ *Continued Performance:* Commercial suppliers may not unilaterally terminate or suspend a contract based upon a suspected breach of contract by the government. Government contracts are subject to the Contract Disputes Act of 1978, which specifies the process for resolving disputes, and requires that the contractor "proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the contracting officer" (paragraph (i) of FAR 52.233-1, Disputes).

■ *Arbitration; Equitable or Injunctive Relief:* Binding arbitration may not be enforced unless explicitly authorized by agency guidance or statute. Equitable remedies or injunctive relief such as attorney fees, cost or interest may only be awarded against the U.S. government when expressly authorized by statute (for example, the Prompt Payment Act).

■ *Additional Terms:* Incorporation of terms by reference is allowed provided the full text of terms is provided with the offer. Unilateral modifications to the commercial supplier agreement after the time of award may be allowed to the extent that the modified terms do not materially change the government's rights or obligations, increase the government's prices, decrease the level of service provided, or limit any government right addressed elsewhere in the contract. A bilateral contract modification is required for any of these changes to be enforceable against the government.

■ *Automatic Renewals:* Automatic contract renewal clauses (which automatically renew or extend contracts unless affirmative action is taken to terminate the agreement) are impermissible because they violate the restrictions of the Anti-Deficiency Act in that they require the obligation of funds prior to appropriations.

■ *Indemnity:* Any clause providing that the commercial supplier or licensor control any litigation arising from the government's use of the contractor's supplies or services is deleted. Such representation when the government is a party is reserved by statute for the U.S. Department of Justice.

■ *Audits:* Discrepancies found during an audit must comply with the invoicing procedures from the underlying contract. Disputed charges must be resolved through the Disputes clause (FAR 52.233-1). Any audits requested by the commercial supplier or licensor will be performed at the supplier's or licensor's expense.

■ *Taxes or Surcharges:* Any taxes or surcharges that will be passed along to the government will be governed by the terms of the underlying contract. The cognizant contracting officer must make a determination of applicability of taxes whenever such a request is made.

■ *Assignment of Commercial Supplier Agreement or Government Contract by Supplier:* The contract, commercial supplier agreement, party rights, and party obligations may not be assigned or delegated without express government approval. Payment to a third party financial institution may be reassigned.

■ *Confidentiality of Commercial Supplier Agreement Terms and Conditions:* The content of the commercial supplier agreement and the Federal Supply Schedule list price (if applicable) may not be deemed confidential. The government may retain other marked confidential information as required by law, regulation or agency guidance, but will appropriately guard such confidential information.

Furthermore, the following additional changes would be made to the GSAR:

■ GSAR 502.101, Definitions, would be added, and it would consist of the following definition for "Commercial Supplier Agreements": "terms and conditions customarily offered to the public by vendors of supplies or services that meet the definition of 'commercial item' set forth in FAR 2.101 [Definitions] and intended to create a binding legal obligation on the end user. Commercial supplier agreements are particularly common in information technology acquisitions, including

acquisitions of commercial computer software and commercial technical data, but they may apply to any supply or service."

■ GSAR 513.302-5, Clauses, would be added to require the inclusion of GSAR 552.232-39 and GSAR 552.232-78 in all acquisitions for supplies or services that are offered under a commercial supplier agreement.

■ GSAR 532.706-3, Clause for Unenforceability of Unauthorized Obligations, would be added to require the inclusion of GSAR 552.232-39 and GSAR 552.232-78 in all solicitations and contracts for supplies or services when not using the procedures in FAR part 12, Acquisition of Commercial Items.

■ GSAR 552.232-39, Unenforceability of Unauthorized Obligations (FAR DEVIATION), would be added to amend the language of FAR 52.232-39, Unenforceability of Unauthorized Obligations, to reflect the GSAR 502.101 definition of "commercial supplier agreements," and to include future fees, penalties, interest and legal costs as unauthorized obligations.

■ GSAR 552.232-78, Commercial Supplier Agreements – Unenforceable Clauses, would be added, and it would address the same unenforceable commercial supplier agreement terms addressed in GSAR 552.212-4(w).

Comments on this proposed rule must be submitted no later than August 1, 2016, identified as "GSAR Case 2015-G512," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) mail: General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, 2nd Floor, ATTN: Ms. Flowers, Washington, DC 20405.