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DOE ADDRESSES CONTRACTING ISSUES WITH ACQUISITION LETTERS, DEVIATIONS

The Department of Energy (DOE) conducted some housecleaning during October by issuing the following: (1) an acquisition letter reemphasizing the mandatory use of STRIPES; (2) an acquisition letter revising requirements for employee benefits cost studies; (3) a deviation reinstating, and making permanent, whistleblower protections for contractor employees; and (4) a deviation streamlining the approval process for overtime compensation for training and education.

■ **Acquisition Letter 2018-01, Strategic Integrated Procurement Enterprise System (STRIPES) Mandatory Use Policy:**

This acquisition letter affirms the mandatory use of STRIPES and its provisions, clauses, terms and conditions, and templates for the creation and administration of DOE contract instruments.

STRIPES is DOE’s acquisition instrument writing, award, and administering system. STRIPES streamlines instrument creation and standardization with its automated processing, uniform construct rules, and established clause databases. STRIPES includes clause databases for the latest Federal Acquisition Regulation (FAR), DOE Acquisition Regulation (DEAR), corporate clauses, and local clauses. (EDITOR’S NOTE: Corporate clauses are used to address situations and issues on a department-wide basis; local clauses address site-specific circumstances.) STRIPES uses templates to “select” which clauses from a particular clause database (FAR, DEAR, corporate, local) should be considered for inclusion by contract type (for example, cost-reimbursement, fixed price, construction, management and operating [M&O], etc.).

■ **Acquisition Letter 2018-02, Employee Benefits Cost Study:** This acquisition letter forwards to contracting officers the revisions to the contractual requirements related to the employee benefits cost study, and requires contracting officers to modify contracts to reflect these revisions.

On January 30, 2017, President Trump issued Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs (see the February 2017 *Federal Contracts Perspective* article “President Trump Orders Regulatory Freeze”). In response to Executive Order 13771, DOE established a Regulatory Reform Task Force to review six focus areas, including contractor human resources requirements, for ways to improve laboratory/contractor efficiency and decrease costs.

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The Task Force identified for elimination an automatic reporting requirement that is imposed when the cost study established threshold is exceeded. Also, the Task Force recommended that the employee benefit cost study comparison process be improved by applying geographic adjustment factors and replacing the per capita comparison approach with the percent of payroll comparison approach for health related costs.

The Deputy Secretary approved the recommended changes, so contracting officers must take appropriate actions, including bilaterally modifying existing contracts, to incorporate the revisions to the DOE Corporate Clause DOE-H-2001 Employee Compensation: Pay and Benefits, specified in Acquisition Letter 2018-02 no later than December 31, 2017.

■ **Deviation on Whistleblower Protections for Contractor Employees:** This deviation adds back into the FAR the whistleblower protections for contractor employees in paragraph (b) of FAR 3.900, Scope of Subpart, and FAR 3.908, Pilot Program for Enhancement of Contractor Employee Whistleblower Protections, which the FAR states had expired in January 2017 but were made permanent in December 2016 with the enactment of Public Law 114-261, An Act to Enhance Whistleblower Protection for Contractor and Grantee Employees.

While the Civilian Agency Acquisition Council (CAAC) is processing a change to the FAR to reflect the permanence of the FAR 3.908 whistleblower protections, this deviation does the following:

- Revises FAR 3.900 to state that paragraph (a) is not in effect (only in effect prior to July 1, 2013), and that paragraph (b) is in effect (in effect on and after July 1, 2013).
- Revises FAR 3.908-9, Contract Clause, to require the inclusion of FAR 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts that exceed the simplified acquisition threshold (\$150,000) *including for commercial items*.
- Removes from paragraph (r) of FAR 52.212-4, Contract Terms and Conditions – Commercial Items, the reference to the whistleblower protections of 41 USC §4712, Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information (the protections being made permanent). This change is being made because there was confusion in the proper use of FAR 52.203-17 (which is inserted in solicitations and contracts for noncommercial items) and FAR 52.212-4 (which is inserted in solicitations and contracts for commercial items). DOE has decided to include FAR 52.203-17 in all solicitations contracts, including those for commercial items, that exceed the simplified acquisition threshold. Since FAR 52.203-17 implements the protections of 41 USC §4712, there is no need to reference 41 USC §4712 in FAR 52.212-4.

Vivina McVay, Editor-in Chief

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- Adds FAR 52.203-17 to the list of clauses in paragraph (b) of FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items, that a contracting officer indicates are incorporated by reference into a contract.
- Revises the FAR clause matrix in FAR 52.301, Solicitation Provisions and Contract Clauses (Matrix), to show an “A” (“required when applicable”) for FAR 52.203-17 for commercial items.

■ **Deviation on Approval of Overtime Compensation for Training and Education:** This deviation streamlines DOE’s consideration and approval of contractors’ requests for approval of overtime premiums for training and education while continuing to emphasize that overtime premiums for training and education merit special scrutiny. The decisions to consider and to approve such requests are at the Head of the Contracting Activities’ (HCAs’) discretion.

The deviation does the following:

- Adds to paragraph (c) of FAR 22.103-3, Procedures [for overtime], the following: “If the contractor’s request includes overtime costs for training and education, the contractor must clearly identify such costs in a separate portion of its request. Absent express written approval of overtime costs for training and education, the costs are expressly unallowable.”
- Adds to paragraph (a) of FAR 22.103-4, Approvals [for overtime], the following: “If the contractor’s request includes overtime costs for training and education, approval by an agency approving official must clearly identify them in a separate portion of the approval. Absent express written approval of overtime costs for training and education, the costs are expressly unallowable.”
- Amends FAR 22.103-4(i) to read as follows (changes in *italics*): “Approvals for using overtime shall ordinarily be prospective, but, if justified by emergency circumstances, approvals, *including approvals for overtime premiums for training*, may be retroactive.”
- Amends paragraph (a) of FAR 31.205-44, Training and Education Costs, to read as follows (changes in *italics*): “Overtime compensation for training and education is unallowable *unless express written approval was obtained from an agency approving official for overtime before the costs were incurred. Also see 22.103-4(i), which addresses emergency circumstances.*”
- Amends paragraph (a) of FAR 52.222-2, Payment of Overtime Premiums, by adding the *italicized phrase*: “The use of overtime, *other than for training and education unless express written approval is obtained from an agency approving official*, is authorized under this contract...”

FY 2017 SPENDING DOWN 9% TO \$430 BILLION

Federal contracting spending in Fiscal Year (FY) 2017 dropped to \$430 billion, down 9.1% from the \$473 billion spending level in FY 2016.

The big loser was the Department of Defense (DOD), which saw its contract spending drop 18%, from \$297.7 billion to \$243.5 billion. The biggest dollar increase winner was the Department of Veterans Affairs, which saw its spending increase 14% from \$22.7 billion to \$25.8 billion. The biggest percentage increase winner was the Peace Corps, which saw its spending increase 68%, from \$62 million to \$103 million.

The following are the largest agencies' FY 2017 spending versus their FY 2016 spending:

Department/Agency	FY 2017 Spending	FY 2016 Spending
Defense	\$243,486,617,473	\$297,686,698,873
Energy	28,949,640,886	28,278,604,484
Veterans Affairs	25,824,127,070	22,683,774,651
Health and Human Services	24,775,365,872	24,000,453,263
National Aeronautics and Space Admin	17,257,343,033	17,275,432,463
Homeland Security	16,096,022,287	13,525,924,569
General Services Administration	11,474,929,496	10,345,493,624
State	10,928,084,404	9,152,752,527
Justice	7,538,075,848	7,455,834,557
Transportation	6,205,561,091	6,750,915,443
Treasury	6,078,523,376	6,208,242,377
Agriculture	5,295,094,732	5,766,430,194
Agency for International Development	5,273,426,265	4,656,445,660
Interior	4,908,719,914	4,388,502,266
Commerce	3,196,724,004	3,194,578,056
Education	2,539,589,526	2,464,188,684
Labor	2,086,854,528	1,820,010,065
Social Security Administration	1,563,696,601	1,275,038,121
Housing and Urban Development	1,378,798,056	1,016,574,179
Environmental Protection Agency	1,275,068,568	1,363,331,523
Office of Personnel Management	782,210,321	936,263,981
National Science Foundation	466,267,212	419,776,373
Securities and Exchange Commission	384,578,333	419,312,948
Pension Benefit Guaranty Corporation	304,823,366	326,787,350
Smithsonian Institution	251,990,193	280,602,419
Nuclear Regulatory Commission	196,744,318	209,146,944
Broadcasting Board of Governors	174,998,321	159,325,339
National Archives and Record Admin	154,469,260	164,107,258
Federal Communications Commission	118,719,966	99,448,637
Small Business Administration	116,413,843	104,643,231
Peace Corps	102,916,598	61,399,598
Others	924,178,472	798,449,506
TOTAL	\$430,110,573,233	\$473,153,217,658

DOD NEGOTIATING MOUs WITH UK, FINLAND

The DOD is requesting that industry provide comments regarding its experience in public defense procurements conducted by or on behalf of (1) the Ministry of Defence of the United Kingdom of Great Britain and Northern Ireland (UK), and/or (2) the Ministry of Defence of the Republic of Finland as DOD contemplates negotiating proposed Reciprocal Defense Procurement Memoranda of Understanding (RDP MOU) with the ministries.

DOD has entered into RDP MOUs with 27 “qualifying countries,” primarily European Union countries, North Atlantic Treaty Organization (NATO) countries, and other allies such as Australia, Egypt, and Israel (see DFARS 225.003, Definitions). The purpose of RDP MOUs is to promote rationalization, standardization, and interoperability of conventional defense equipment with allies and other friendly governments.

RDP MOUs generally include language by which the parties agree that their defense procurements will be conducted in accordance with certain implementing procedures. These procedures relate to: (1) publication of notices of proposed purchases; (2) the content and availability of solicitations for proposed purchases; (3) notification to each unsuccessful offeror; (4) feedback, upon request, to unsuccessful offerors concerning the reasons they were not allowed to participate in a procurement or were not awarded a contract; and (5) provision for the hearing and review of complaints arising in connection with any phase of the procurement process to ensure that, to the extent possible, complaints are equitably and expeditiously resolved.

Based on the RDP MOU, each country affords the other country certain benefits on a reciprocal basis consistent with national laws and regulations. The benefits that the United States accords to the products of qualifying countries include: (1) evaluating offers of qualifying country end products without applying the price differentials required by the Buy American statute and the Balance of Payments Program; and (2) customs, taxes, and duties are waived for qualifying country end products and components of defense procurements.

Both the UK and Finland have been listed as “qualifying countries” in the definition of “qualifying country” in DFARS 225.003(10), and offers of products of the UK and Finland, or that contain components from these countries, would continue to be afforded the benefits available to all qualifying countries. Also, this means that U.S. products would be exempt from any analogous “Buy UK” and “Buy Finland” laws or policies applicable to procurements by the Ministry of Defence of each country.

While DOD is evaluating the UK’s and Finland’s laws and regulations in this area, DOD would benefit from U.S. industry’s experience in participating in these countries’ public defense procurements. Therefore, DOD is asking U.S. firms that have participated or attempted to participate in procurements by or on behalf of the UK’s Ministry of Defence or Finland’s Ministry of Defence to let DOD know if the procurements were conducted with transparency, integrity, fairness, and due process in accordance with published procedures; if not, to explain the nature of the problems encountered.

Also, DOD is interested in comments relating to the degree of reciprocity that exists between the U.S. and the UK and Finland when it comes to the openness of defense procurements to offers of products from the other country.

Written comments must be submitted no later than November 20, 2017, by either: (1) mail: Defense Procurement and Acquisition Policy, Attn: Patricia Foley, 3060 Defense Pentagon, Room 5E621, Washington, DC 20301-3060; or (2) email: patricia.g.foley.civ@mail.mil.

SBA UPDATES NAICS CODES FOR WOSB PROGRAM

The Small Business Administration (SBA) is updating the North American Industry Classification System (NAICS) codes authorized for use in the Women-Owned Small Business (WOSB) Federal Contract Program (WOSB Program). The update is necessary to reflect the U.S. Office of Management and Budget’s (OMB) NAICS revision for 2017 (NAICS 2017), which created 21 new industries by reclassifying, combining, or splitting 29 NAICS 2012 industry codes. These changes affect eight (8) of the NAICS 2012 codes designated for use under the WOSB Program. (For more on NAICS 2017, see the September 2016 *Federal Contracts Perspective* article “OMB Issues 2017 Version of the NAICS.”)

Subsequently, the SBA adopted OMB’s NAICS 2017 into its table of small business size standards, effective October 1, 2017 (see the October 2017 *Federal Contracts Perspective* article “SBA Adopts NAICS 2017 For Size Standards”).

To align the WOSB Program with OMB’s NAICS 2017 and SBA’s adoption of NAICS 2017 for its size standards, SBA is amending the NAICS codes eligible for use under the WOSB Program (including those limited to Economically Disadvantaged WOSBs [EDWOSB]) as follows:

NAICS 2012			NAICS 2017		
6-Digit	Description	WOSB/EDWOSB	6-Digit	Description	WOSB/EDWOSB
333911	Pump and Pumping Equipment Manufacturing	WOSB	333914	Measuring, Dispensing, and Other Pumping Equipment Manufacturing	WOSB
333913	Measuring and Dispensing Pump Manufacturing	WOSB	333914	Measuring, Dispensing, and Other Pumping Equipment Manufacturing	WOSB
512210	Record Production	WOSB	512250	Record Production and Distribution	WOSB
512220	Integrated Record Production/Distribution	WOSB	512250	Record Production and Distribution	WOSB
517110	Wired Telecommunications Carriers	EDWOSB	517311	Wired Telecommunications Carriers	EDWOSB
517210	Wireless Telecommunications Carriers (except Satellites)	WOSB	517312	Wireless Telecommunications Carriers (except Satellites)	WOSB
541711	Research and Development in Biotechnology	WOSB	541713	Research and Development in Nanotechnology	WOSB
			541714	Research and Development in Biotechnology (except Nanobiotechnology)	WOSB

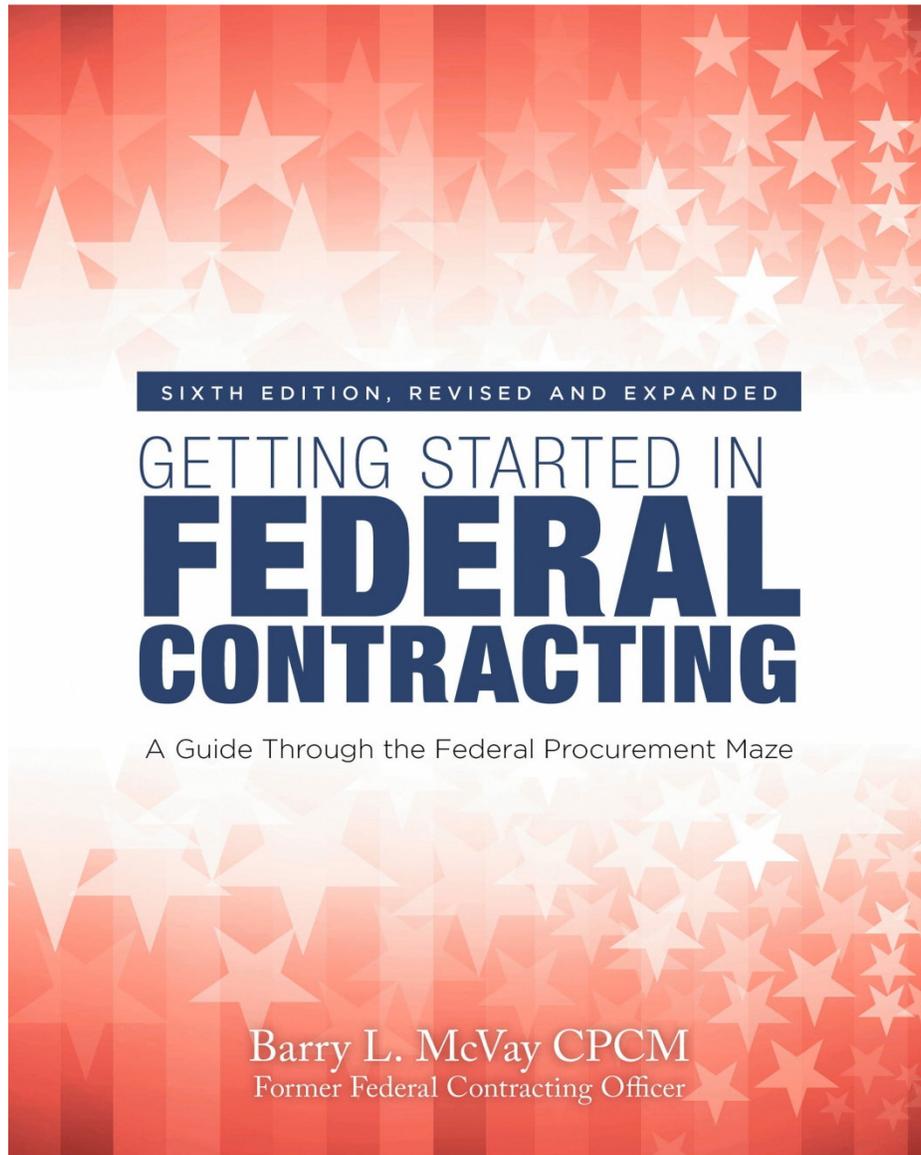
541712	Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology)	WOSB	541713	Research and Development in Nanotechnology	WOSB
			541715	Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology)	WOSB

For more information on the SBA's WOSB Program, go to <http://www.sba.gov/wosb>.

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