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FAC 2005-47 REVISES HUBZONE PROGRAM, ALLOWS SUBCONTRACTOR SDB SELF-CERTIFICATION

Federal Acquisition Circular (FAC) 2005-47 amends Federal Acquisition Regulation (FAR) Part 19, Small Business Programs, to bring the FAR into conformance with recent changes made by the Small Business Administration (SBA) to two of its programs: the Historically Underutilized Business Zone (HUBZone) program, and self-certification of qualification as a small disadvantaged business (SDB). Other rules in FAC 2005-47 address interagency agreements, pass-through charges, suspension and debarment, and notification of employee rights.

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■ **HUBZone Program Revisions:** This finalizes, with changes, the proposed rule that implements changes made by the Small Business Administration (SBA) to its HUBZone program regulations. These changes require that, for award of a HUBZone contract, a HUBZone small business must be a HUBZone small business both at the time of its initial offer and at the time of contract award (HUBZone small business offerors are already required to represent their HUBZone small business status at the time of their initial offers). In addition, for general construction or construction by special trade contractors, a HUBZone small business concern must spend at least 50% of the cost of contract performance incurred for personnel on its own employees or subcontract employees of other HUBZone small business concerns.

The proposed rule would implement the SBA regulatory changes in paragraph (d) of FAR 19.1303, Status as a HUBZone Small Business Concern ("To be eligible for a HUBZone contract under this section, a HUBZone small business concern must be a HUBZone small business concern both at the time of its initial offer and at the time of contract award"); paragraph (f) of FAR 52.219-3, Notice of Total HUBZone Set-Aside or Sole Source Award [formerly titled "Notice of Total HUBZone Set-Aside"]; and paragraph (g) of FAR 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns.

Seven respondents submitted comments on the proposed rule, and the proposed rule is finalized with the following changes:

– Proposed paragraph (d) of FAR 52.219-8, Utilization of Small Business Concerns, would have required that, for a competitive subcontract, that the contractor inform each unsuccessful subcontract offeror in writing of the name and location of the apparent successful offeror prior to award of the contract to the successful subcontract offer. The

intent was to conform the FAR with the SBA regulations. However, the proposed rule made it appear that the notification requirement applied to all competitive subcontractors, even when small businesses did not compete. Because the requirement applies only to prime contractors with contracts requiring subcontracting plans, the requirement is moved to paragraph (e)(6) of FAR 52.219-9, Small Business Subcontracting Plan.

– The proposed rule would change the title of FAR 19.1303 from "Status as a Qualified HUBZone Small Business Concern" to "Status as a HUBZone Small Business Concern" (deleted the word "Qualified"). However, in the proposed rule, FAR 19.1303(a) still retained the phrase "qualified HUBZone small business concern." The word "qualified" is removed from FAR 19.1303(a) in the final rule.

For more on the proposed rule, see the May 2009 ***Federal Contracts Perspective*** article "FAR Changes Would Require Rerepresentation of Eligibility to Participate in SBA'S HUBZone Program." For more on the SBA's changes to its HUBZone regulations, see the May 24, 2004, ***Federal Register*** notice "Small Business Size Regulations; Government Contracting Programs; HUBZone Program." For more on SBA's 2005 regulatory changes to its HUBZone regulations, see the October 2005 ***Federal Contracts Perspective*** article "SBA Amends HUBZone Eligibility Requirements."

■ **Small Disadvantaged Business Self-Certification:** This interim rule amends FAR Subpart 19.7, The Small Business Subcontracting Program, and associated clauses to allow subcontractors on federal contracts to self-represent their status as SDBs to prime contractors.

In September 2008, SBA ceased certifying eligible firms as SDBs because only two agencies, the National Aeronautics and Space Administration (NASA) and the Coast Guard, are eligible to use the 10% SDB price evaluation preference authorized by FAR Subpart 19.11, Price Evaluation Adjustment for Small Disadvantaged Business Concerns, and those two agencies hardly used it at all (see the October 2008 ***Federal Contracts Perspective*** article "SBA Ceases Certifying SDBs"). Subsequently, SBA revised its regulations to allow SDB subcontractors to provide written statements to prime contractors representing in good faith their status as an SDB concern for the purposes of subcontract awards under federal prime contracts (see the October 3, 2008, ***Federal Register*** notice "Small Disadvantaged Business Program").

To maintain consistency between the FAR and the SBA regulations, the following changes are made to the FAR:

– In FAR 2.101, Definitions, the term "small disadvantaged business concern" is revised to allow small businesses to self-represent their status as SDBs for subcontracts (the definition continues to recognize small businesses that have been certified by SBA).

– To the first sentence in paragraph (b) of FAR 19.703, Eligibility Requirements for

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Participating in the [Small Business Subcontracting] Program, is added "small disadvantaged business". The sentence now reads: "A contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor's status as a small business, ***small disadvantaged business***, veteran-owned small business, service-disabled veteran-owned small business, or a woman-owned small business concern" (emphasis added).

– To the definition of "small disadvantaged business concern" in paragraph (c) of FAR 52.219-8, Utilization of Small Business Concerns, is added the following method of qualification: "It represents in writing that it qualifies as a small disadvantaged business (SDB) for any federal subcontracting program, and believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals and meets the SDB eligibility criteria of 13 CFR 124.1002 [What is a Small Disadvantaged Business (SDB)?]."

– FAR 52.219-25, Small Disadvantaged Business Participation Program – Disadvantaged Status and Reporting, is amended to add the following new paragraph (b): "For subcontractors that are not certified as a small disadvantaged business by the Small Business Administration, the contractor shall accept the subcontractor's written self-representation as a small disadvantaged business, unless the contractor has reason to question the self-representation."

Comments on this interim rule must be submitted no later than February 11, 2011, identified as "FAC 2005-47, FAR Case 2009-019," 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: Hada Flowers, 1275 First Street, NE, Washington, DC 20417.

■ **Preventing Abuse of Interagency Contracts:** This interim rule revises FAR Subpart 17.5, Interagency Acquisitions (formerly "Interagency Acquisitions Under the Economy Act"), to implement Section 865 of the National Defense Authorization Act (NDAA) for Fiscal Year 2009 (Public Law 110-417), which requires that *all* interagency acquisitions (not just those conducted under the Economy Act): (1) include a written agreement between the requesting agency and the servicing agency assigning responsibility for the administration and management of the contract; (2) include a determination that an interagency acquisition is the best procurement alternative; and (3) include sufficient documentation to ensure an adequate audit.

To implement Section 865, the following revisions are made:

– FAR 17.500, Scope of Subpart, is expanded to be applicable to all interagency acquisitions under any authority, except to orders of $500,000 or less issued against Federal Supply Schedules (this is a threshold established by Section 865).

– FAR 17.501, General, is added. It states that "interagency acquisitions are commonly conducted through indefinite-delivery contracts, such as task- and delivery-order contracts. The indefinite-delivery contracts used most frequently to support interagency

acquisitions are Federal Supply Schedules (FSS), governmentwide acquisition contracts (GWACs), and multi-agency contracts (MACs)."

- FAR 17.502, Procedures, consists of two subsections:
  - FAR 17.502-1, General, requires agencies to support the decision to use an interagency acquisition with a determination that such action is the "best procurement approach," and directs that assisted acquisitions be accompanied by written agreements between the requesting agency and the servicing agency documenting the roles and responsibilities of the respective parties, including the planning, execution, and administration of the contract.
  - FAR 17.502-2, The Economy Act, is essentially the guidance and procedure that was in the old FAR Subpart 17.5. However, added is a requirement for the development of business cases to support the creation of multi-agency contracts. (The Office of Management and Budget (OMB) is developing additional guidance on the use of business cases; once the guidance is issued, it will be referenced in the FAR.)
- FAR 17.504, Reporting Requirements, requires the senior procurement executive for each executive agency to submit an annual report on interagency acquisitions to the Director of OMB.

In addition, the definitions of "interagency acquisition," "direct acquisition," and "assisted acquisitions" are clarified and moved from FAR Subpart 4.6, Contract Reporting, and FAR Subpart 17.5, to FAR 2.101, Definitions. Finally, FAR 8.404, Use of Federal Supply Schedules, is amended to add a cross-reference to the requirements in FAR Subpart 17.5 for orders over $500,000.

Comments on this interim rule must be submitted no later than February 11, 2011, identified as "FAC 2005-47, FAR Case 2008-032," 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: Hada Flowers, 1275 First Street, NE, Washington, DC 20417.

NOTE: Training on interagency acquisitions is available through the Federal Acquisition Institute (FAI) at **http://www.fai.gov/IAA/launchpage.htm**.

■ **Notification of Employee Rights Under the National Labor Relations Act:** This interim rule implements Executive Order 13496, Notification of Employee Rights Under Federal Labor Laws, which requires contractors to display a notice to employees of their rights under federal labor laws, by adding FAR Subpart 22.16 and accompanying clause FAR 52.222-40, both titled "Notification of Employee Rights Under the National Labor Relations Act."

FAR Subpart 22.16 requires contracting officers to insert FAR 52.222-40 in all solicitations and contracts including acquisitions for commercial items and commercially available off-the-shelf (COTS), except acquisitions: (1) under the simplified acquisition threshold; (2) for work performed exclusively outside the United States; or (3) covered in their entirety by an exemption granted by the Secretary of Labor. FAR 52.222-40 requires covered contractors and subcontractors "to post a notice, of such size and in such form, and containing such content as

the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract..."

The National Labor Relations Act gives workers the right to organize and bargain collectively, and the notice advises employees of these rights. Covered contractors or subcontractors that fail to post the notice, do not comply with the provisions of the notice, or do not comply with related rules may have their contracts cancelled, terminated, or suspended in whole or in part, and be declared ineligible for further government contracts.

The notice may be: (1) obtained from the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5609, Washington, DC 20210, 202-693-0123, or from any field office of the Office of Labor-Management Standards or Office of Federal Contract Compliance Programs; (2) provided by the federal contracting agency if requested; (3) downloaded from the Office of Labor-Management Standards website at **http://www.dol.gov/olms/regs/compliance/EO13496.htm**; or (4) reproduced and used as exact duplicate copies of the Department of Labor's official poster.

Comments on this interim rule must be submitted no later than February 11, 2011, identified as "FAC 2005-47, FAR Case 2010-006," 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: Hada Flowers, 1275 First Street, NE, Washington, DC 20417.

NOTE: This executive order is an example of the back-and-forth that takes place when Democratic and Republican administrations transition. President Obama's Executive Order 13496 rescinded President George W. Bush's Executive Order 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees. Executive Order 13201 rescinded President Clinton's Executive Order 12836, which rescinded President George H. W. Bush's Executive Order 12800, which started it all by requiring contractors and subcontractors to post notices alerting nonunion employees that they cannot be forced to pay fees to unions to support activities not related to collective bargaining, such as contributions to support political candidates. The next time a Republican moves into the White House, undoubtedly Executive Order 13496 will be rescinded and replaced with something similar to Executive Order 13201!

For more on Executive Order 13496, see the March 2009 ***Federal Contracts Perspective*** article "Obama Issues Four Labor-Related Executive Orders." For more on Executive Order 13201, see the March 2001 ***Federal Contracts Perspective*** article "Bush Issues Three Acquisition-Related Orders Involving Labor Issues in FAR Part 22."

■ **Uniform Suspension and Debarment Requirement:** This interim rule implements Section 815 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84), which extends the flowdown of the restriction on subcontracting to lower tier subcontractors that have been suspended or debarred, with some exceptions for contracts for the acquisition of commercial items and commercially available off-the-shelf (COTS) items.

To implement Section 815, the following changes are made to the FAR:

- The introduction to paragraph (b) of FAR 9.405-2, Restrictions on Subcontracting, is revised to exclude COTS items from the restrictions on subcontracting with contractors that have been debarred, suspended, or proposed for debarment; and to limit the

notification requirement to first-tier subcontracts for acquisitions of commercial items that exceed $30,000.

– FAR 52.209-6, Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, is amended by adding the definition of COTS items from FAR 2.101, Definitions; and by flowing down the requirements to check whether a subcontractor is suspended or debarred beyond the first-tier, with the stated exceptions for COTS items.

– New subparagraph (b)(6) is added to FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items, to require that the contractor of commercial items be required to comply with FAR 52.209-6 because the requirement that commercial contracts must flow the requirement down to the first-tier is now statutory.

Comments on this interim rule must be submitted no later than February 11, 2011, identified as "FAC 2005-47, FAR Case 2009-036," 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: Hada Flowers, 1275 First Street, NE, Washington, DC 20417.

■ **Limitation on Pass-Through Charges:** This finalizes, with changes, the interim rule that implemented Section 866 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009 (Public Law 110-417) (which applies to executive agencies other than the Department of Defense (DOD), and Section 852 of the NDAA for FY 2007 (Public Law 109-364) (which applies to DOD). Section 866 and Section 852 require the development of regulations that minimize excessive pass-through charges by contractors from subcontractors that add no or negligible value, and to ensure that neither a contractor nor a subcontractor receives indirect costs or profit/fee (that is, on pass-through charges) on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no or negligible value.

The interim rule implemented Section 866 and Section 852 by adding FAR 52.215-22, Limitations on Pass-Through Charges – Identification of Subcontract Effort, for inclusion in solicitations containing FAR 52.215-23, Limitations on Pass-Through Charges.

– FAR 52.215-22 requires the offeror to identify in its proposal how much of the contract effort is to be performed by the contractor and each of its subcontractors under the contract, task order, or delivery order. If the offeror intends to subcontract more than 70% of the total cost of work to be performed, the offeror is required to identify: (1) the amount of the offeror's indirect costs and profit/fee applicable to the work to be performed by the subcontractor(s); and (2) a description of the added value provided by the offeror as related to the work to be performed by the subcontractor(s). This requirement applies if any subcontractor proposed under the contract, task order, or delivery order intends to subcontract to a lower-tier subcontractor more than 70% of the total cost of work to be performed under its subcontract.

– FAR 52.215-23 requires that the contractor notify the contracting officer if: (1) the contractor changes the amount of subcontract effort after award such that it exceeds 70% of the total cost of work to be performed under the contract, task order, or delivery order; or (2) any subcontractor changes the amount of lower-tier subcontractor effort after award such that it exceeds 70% of the total cost of the work to be performed under its subcontract. If the contracting officer determines that excessive pass-through charges exist in cost-reimbursement contracts, the excessive pass-through charges are unallowable. In addition, the contracting officer, or authorized representative, has the right to examine and audit all the contractor's (and covered subcontractor's) records necessary to determine whether the contractor proposed, billed, or claimed excessive pass-through charges. Finally, the clause requires the contractor to insert the substance of the clause in all cost-reimbursement subcontracts under this contract that exceed the simplified acquisition threshold ($150,000). However, if the contract is with DOD, then the contractor must insert the clause in all cost-reimbursement subcontracts and fixed-price subcontracts that exceed the threshold for obtaining cost or pricing data in FAR 15.403-4 ($700,000) except when the contract type is expected to be: (1) a firm-fixed-price contract awarded on the basis of adequate price competition; (2) a fixed-price contract with economic price adjustment awarded on the basis of adequate price competition; (3) a firm-fixed-price contract for the acquisition of a commercial item; or (4) a fixed-price contract with economic price adjustment for the acquisition of a commercial item. Covered subcontractors must include the clause in its covered lower-tier subcontracts.

Five respondents submitted comments on the interim rule, and the final rule adopts the interim rule with the addition of two types of fixed-price incentive contracts to the list of DOD contract types in subparagraph (n)(2)(i)(B)(2) of FAR 15.408, Solicitation Provisions and Contract Clauses, that are not subject to the limitation on pass-through charges clauses. These additions are fixed-price incentive contracts awarded on the basis of adequate price competition and fixed-price incentive contracts for the acquisition of a commercial item. Section 852 is clear that DOD contracts awarded on the basis of adequate price competition, and DOD contracts for the acquisition of a commercial item are not subject to the limitation on pass-through charges.

For more on the interim rule, see the November 2009 ***Federal Contracts Perspective*** article "FAC 2005-37 Provides Guidance on Use of Award Fees."

COMPETITIVENESS DEMONSTRATION PROGRAM REMOVED

FAC 2005-48 removes FAR Subpart 19.10, Small Business Competitiveness Demonstration Program, to comply with Section 1335 of the Small Business Jobs Act of 2010 (Public Law 111-240), which repealed the Small Business Competitiveness Demonstration Program (for more on Public Law 111-240, see the October 2010 ***Federal Contracts Perspective*** article "Parity Among Small Business Programs Mandated by Statute"). The Small Business Competitiveness Demonstration Program was deceptively titled in that it actually *prohibited* set-asides of contracts for certain services in five industries: construction; refuse systems and related services; architectural and engineering services; nonnuclear ship repair; and landscaping and pest control services. Congress came to the conclusion that enough had been demonstration, so it repealed the program.

In addition to the removal of FAR Subpart 19.10 from the FAR, FAC 2005-48 also makes the following changes to the FAR:

■ **Personal Identity Verification (PIV) of Contractor Personnel:** This finalizes, with changes, the proposed rule that would amend FAR Subpart 4.13, Personal Identity Verification (specifically, by adding paragraphs (d)(1) and (d)(2) to FAR 4.1301, Policy [on PIV]), and FAR 52.204-9, Personal Identity Verification of Contractor Personnel, to reinforce the requirement of collecting from contractors all forms of government-provided identification once they are no longer needed to support a contract. This is important because a PIV card is required to gain access to a federal facility.

Three respondents submitted comments on the proposed rule. Though none of the comments were adopted, the FAR text is changed in the final rule as follows:

- FAR 4.1301(d)(1) is revised to clarify that FAR Subpart 4.13 applies to agency procedures related to PIV card return.
- FAR 4.1301(d)(1) and FAR 52.204-9(b) are revised to clarify that the regulations apply when PIV cards are issued to contractor employees.
- FAR 52.204-9(d) is revised to clarify that the clause applies to all subcontractor employees when they are required to have access to a federally-controlled facility and/or routine access to a federally-controlled information system.
- FAR 52.204-9(d) is also revised to clarify that the prime contractor is responsible for returning all subcontractor PIV cards that have been issued by an agency.

For more on the proposed rule, see the June 2010 ***Federal Contracts Perspective*** article "FAR Changes Proposed on Terminations, ID Verifications."

■ **Terminating Contracts:** This final rule amends FAR Part 49, Termination of Contracts, to clarify the part's inapplicability to the termination of contracts for the acquisition of commercial items.

The proposed rule would have amended paragraph (a) of FAR 49.502, Termination for convenience of the Government, which addresses fixed-price contracts that do not exceed the simplified acquisition threshold ($150,000), to clarify when FAR 52.249-1, Termination for Convenience of the Government (Fixed Price) (Short Form), is used. The proposed rule would have apprised contracting officers that there are alternative clauses that can be used for terminations up to the simplified acquisition threshold: FAR 52.212-4, Contract Terms and Conditions – Commercial Items; or FAR 52.213-4, Terms and Conditions – Simplified Acquisitions (Other Than Commercial Items).

One respondent submitted comments on the proposed rule. As a result, the proposed rule was essentially withdrawn, and the following changes are made instead:

- The language in FAR 49.501 pertaining to the applicability of FAR Part 49 to commercial item contracts is relocated to FAR 49.002, Applicability [of FAR Part 49]. Doing so clarifies that FAR Part 49 does not apply to commercial item contracts awarded using the procedures in FAR Part 12, Acquisition of Commercial Items. In addition, language is added to clarify that FAR Part 49 does not apply to the acquisition of commercial items when using procedures in FAR Part 12.

– The proposed reference to the exception for FAR 52.212-4 is relocated to FAR 49.002. The reference to FAR 52.213-4 is retained in FAR 49.501 as proposed.

For more on the proposed rule, see the June 2010 ***Federal Contracts Perspective*** article "FAR Changes Proposed on Terminations, ID Verifications."

■ **Payrolls and Basic Records:** This finalizes, with one change, the interim rule that revised paragraph (b)(1) of FAR 52.222-8, Payrolls and Basic Records, to remove the requirement to submit complete social security numbers and home addresses of individual workers in weekly payroll submissions under construction contracts. However, the revised paragraph requires contractors and subcontractors to maintain the full social security number and current address of each covered worker, and to provide them upon request to the contracting officer, the contractor, or the Department of Labor's Wage and Hour Division for purposes of an investigation or audit of compliance with prevailing wage requirements. The interim rule implemented changes from the Department of Labor's final rule that removed the requirement to submit complete social security numbers and home addresses of individual workers in weekly payroll submissions under construction contracts.

No comments were submitted on the interim rule, so the rule is adopted as final except that an updated version of DOL's Form WH-347, Payroll (For Contractor's Optional Use), is included in FAR 53.303–WH–347. (Form WH-347 is available at **http://www.dol.gov/whd/forms/wh347.pdf**.)

For more on the interim rule, see the July 2010 ***Federal Contracts Perspective*** article "FAC 2005-42 Addresses Disclosure of Noncompetitive Contract Justifications, Recovery Act."

DOD CONTINUES ITS RAMPAGE THROUGH THE DFARS

The Department of Defense (DOD) continues its year-long rampage through the Defense FAR Supplement (DFARS), issuing four final rules, one statutory waiver, and one policy memorandum. In addition, DOD is preparing for more rampaging by issuing three proposed rules.

■ **Restriction on Ball and Roller Bearings:** This final rule revises the domestic source restriction on acquisition of ball and roller bearings in Defense FAR Supplement (DFARS) 225.7009, Restriction on Ball and Roller Bearings.

DFARS 225.7009 implemented two statutory restrictions: 10 U.S.C. 2534(a)(5) and annual appropriations act restrictions. 10 U.S.C. 2534(a)(5) required that all ball and roller bearings and bearing components be wholly manufactured in the United States or Canada, whereas the annual defense appropriations act restrictions require that all ball and roller bearings be produced by a domestic source and be of domestic origin (DOD always interprets the term "domestic" to include Canada unless the statute specifically provides otherwise). This "domestic" restriction in the annual appropriations acts is not applied to the acquisition of commercial items unless the commercial bearings themselves are purchased as the end products.

Since the 10 U.S.C. 2534(a)(5) restriction was considered to be more stringent than the annual defense appropriations act restriction, DFARS 225.7009 reflected the 10 U.S.C. 2534(a)(5) requirement that bearings and main bearing components be 100% manufactured in

the U.S. or Canada. However, 10 U.S.C. 2534(a)(5) expired on October 1, 2005, so DOD proposed revising DFARS 225.7009-2, Restriction [on ball and roller bearings] to reflect the annual defense appropriations act restriction only. DFARS 225.7009-2 had directed contracting officers "Do not acquire ball and roller bearings or bearing components unless the bearings and bearing components are manufactured in the United States or Canada." DOD proposed that this language be changed to "Do not acquire ball and roller bearings unless: (1) the bearings are manufactured in the United States or Canada; and (2) for each ball or roller bearing, the cost of the bearing components mined, produced, or manufactured in the United States or Canada exceeds 50% of the total cost of the bearing components of that ball or roller bearing" (DFARS 252.225-7016, Restriction on Acquisition of Ball and Roller Bearings, was proposed to be revised accordingly as well).

Three respondents submitted comments on the proposed rule. No changes were made as a result of the comments, but three editorial changes were made.

For more on the proposed rule, see the June 2010 ***Federal Contracts Perspective*** article "DOD Publishes Five Proposed Rules, Two Deviations."

■ **Restrictions on the Use of Mandatory Arbitration Agreements:** This finalizes, with changes, the interim rule that added DFARS Subpart 222.74, Restrictions on the Use of Mandatory Arbitration Agreements, and the associated clause DFARS 252.222-7006, Restrictions on the Use of Mandatory Arbitration Agreements, to implement Section 8116 of the DOD Appropriations Act for Fiscal Year 2010 (Public Law 111-118). Section 8116 prohibits the use of mandatory arbitration agreements when using funds appropriated by Public Law 111-118 for any contract that exceeds $1,000,000 (including task or delivery orders and bilateral modifications adding new work), if the contractor restricts its employees or independent contractors to arbitration for claims "under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention." DFARS Subpart 222.74 and DFARS 252.222-7006 do not apply to the acquisition of commercial items, including commercially available off-the-shelf items. After June 17, 2010, contractors were required to certify compliance by their subcontractors.

Four respondents submitted comments on the interim rule, and the following are changes made to the final rule as a result of those comments:

- DFARS 222.7401, Definition, is added (DFARS 222.7401 through DFARS 222.7404 in the interim rule are renumbered DFARS 222.7402 through DFARS 222.7405, respectively). It refers to DFARS 252.222-7006 for the definition of "covered subcontractor."

- DFARS 222.7403, Waiver, is revised to incorporate text on the particular requirements for the Secretary of Defense's waiver determination that was previously reserved for the DFARS companion resource, Procedures, Guidance, and Information (PGI).

For more on the interim rule, see the June 2010 ***Federal Contracts Perspective*** article "DOD Implements Restriction on Contractor Use of Mandatory Arbitration Agreements."

■ **Organizational Conflicts of Interest in Major Defense Acquisition Programs:** This finalizes, with changes, the proposed rule that would add a subpart to DFARS Part 203, Improper Business Practices and Personal Conflicts of Interest, to implement Section 207 of the Weapons System Acquisition Reform Act of 2009 (Public Law 111-23), which requires DOD to provide uniform guidance and tighten existing requirements for organizational conflicts of interest (OCIs) by contractors in major defense acquisition programs (MDAPs). The law sets out situations that must be addressed and allows DOD to establish such limited exceptions as are necessary to ensure that DOD has continued access to advice on systems architecture and systems engineering matters from highly qualified contractors, while ensuring that such advice comes from sources that are objective and unbiased.

Twenty-one (21) respondents submitted comments on the proposed rule, and the following are changes made to the final rule as a result of those comments:

- The proposed rule would have added DFARS Subpart 203.12, Organizational Conflicts of Interest. The final rule temporarily moves the new regulations to DFARS Subpart 209.5, Organizational and Consultant Conflicts of Interest (specifically, to DFARS 209.571, Organizational Conflicts of Interest in Major Defense Acquisition Programs), because changes to the FAR are being considered, including relocating the FAR coverage on OCIs.

- The proposed rule attempted to provide comprehensive OCI policy for all types of contracts susceptible to OCIs, not just those aspects unique to MDAPs and systems engineering and technical assistance (SETA) contracting, and to temporarily apply the Section 207 provisions to MDAP and other OCI-susceptible contracts so all would benefit from the improved coverage until the FAR is modified. However, coordinating and reconciling the comments on the DFARS rule with the team developing FAR coverage would have delayed the finalization of this rulemaking and could create unnecessary confusion. Therefore, DOD has concluded that the final DFARS rule will address only MDAP and SETA OCI coverage as required by Section 207.

- Paragraph (b) of DFARS 209.571-2, Applicability, states that DFARS 209.571 takes precedence over FAR Subpart 9.5 if there are any inconsistencies.

- Paragraph (b) of DFARS 209.571-3, Policy, provides the following policy statement: "Contracting officers generally should seek to resolve organizational conflicts of interest in a manner that will promote competition and preserve DOD access to the expertise and experience of qualified contractors."

- Paragraph (a) of DFARS 209.571-7, Systems Engineering and Technical Assistance Contracts, directs agencies to obtain advice on systems architecture and systems engineering matters with respect to "pre-major defense acquisition programs from Federally Funded Research and Development Centers or other sources independent of the major defense acquisition program contractor."
- DFARS 209.571-7(c) is revised to require a head of the contracting activity to execute a determination waiving the limitation on future development and production contracting if DOD needs access to the domain experience and expertise of the apparently successful

offeror and, based on the agreed-to resolution strategy, the apparently successful offeror will be able to provide objective and unbiased advice.

– The definition of "major subcontractor" in DFARS 252.209-7009, Organizational Conflict of Interest – Major Defense Acquisition Program, is revised to add the italicized limits, so it now reads: "a subcontractor that is awarded a subcontract that equals or exceeds (1) *both the cost or pricing data threshold [$700,000] and* 10% of the value of the contract under which the subcontracts are awarded, or (2) *$50 million*."

For more on the proposed rule, see the May 2010 ***Federal Contracts Perspective*** article "DOD Rolls Out More Policies and Regulations."

■ **Foreign Participation in Acquisitions in Support of Operations in Afghanistan:** This finalizes, with changes, the proposed rule that would add DFARS 225.7704, Acquisitions of Products and Services from South Caucasus/Central and South Asian (SC/CASA) State in Support of Operations in Afghanistan, to allow acquisition from the nine SC/CASA states (Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkmenistan, and Uzbekistan) by waiving the Trade Agreements Act prohibition on acquisitions of products or services from non-designated countries, and waiving the provisions of the Balance of Payments Program for offers of products (other than arms, ammunition, or war materials) and construction materials from these SC/CASA states acquired in direct support of operations in Afghanistan.

No comments were submitted on the proposed rule. However, the following editorial and technical changes are made to the final rule:

– Paragraph (6)(i) of DFARS 225.1101, Acquisition of Supplies, is revised to reference the World Trade Organization (WTO) Government Procurement Agreement (GPA) instead of the Trade Agreements Act , in conformance with FAR 25.1101(c)(1) ("Use the clause at [DFARS] 252.225-7021, Trade Agreements, instead of the clause at FAR 52.225-5, Trade Agreements, if the World Trade Organization Government Procurement Agreement applies").

– Amends paragraph (d) of Alternate II to DFARS 252.225-7021, Trade Agreements, to limit the applicability of the clause. Only contractors from an SC/CASA state are required to notify the government of the SC/CASA state with regard to the benefit of providing reciprocal procurement opportunities to U.S. products and services, in conformance with the requirement imposed by the United States Trade Representative.

– Corrects DFARS 252.225-7035, Buy American Act – Free Trade Agreements – Balance of Payments Program Certificate, and DFARS 252.225-7036, Buy American Act – Free Trade Agreements – Balance of Payments Program, so that Peruvian end products are not erroneously treated as eligible products in acquisitions that do not exceed the WTO GPA threshold (see the February 2010 ***Federal Contracts Perspective*** article "Proposed DFARS Changes Address Business Systems and Increased Acquisition Thresholds" for implementation of the Peruvian Free Trade Agreement). The threshold for end products for the Peruvian Free Trade Agreement (like the Free Trade Agreements of Bahrain and

Morocco) is equal to the threshold of the WTO GPA ($203,000). Therefore, these trade agreements are only in effect for acquisitions that exceed the WTO GPA threshold.

For more on the proposed rule, see the February 2010 ***Federal Contracts Perspective*** article "Proposed DFARS Changes Address Business Systems and Increased Acquisition Thresholds."

■ **Waiver of 10 U.S.C. 2534 for Certain Defense Items Produced in the United Kingdom:** The Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) is waiving the limitation of Title 10 of the U.S. Code (USC), Section 2534, Miscellaneous Limitations on the Procurement of Goods Other than United States Goods (10 USC 2534) for certain defense items produced in the United Kingdom (UK). 10 USC 2534 limits the DOD to procuring items listed in that section only if the manufacturer of the item is part of the national technology and industrial base. However, the Secretary of Defense may waive this restriction for a particular item listed in Section 2534 and for a particular foreign country if the Secretary determines that application of the limitation "would impede the reciprocal procurement of defense items under a memorandum of understanding providing for reciprocal procurement of defense items" and if "that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country." The Secretary of Defense has delegated this waiver authority to the USD(AT&L).

The USD(AT&L) has extended for one year, from December 23, 2010, to December 22, 2011, the waiver of the limitation on procurement of the following products from the UK:

- Air circuit breakers
- Welded shipboard anchor and mooring chain with a diameter of four inches or less
- Gyrocompasses
- Electronic navigation chart systems
- Steering controls
- Pumps
- Propulsion and machinery control systems
- Totally enclosed lifeboats

The USD(AT&L) granted this waiver because the UK does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in the UK, and the application of the limitation in 10 USC 2534 against defense items produced in the UK would impede the reciprocal procurement of defense items under the Reciprocal Defense Procurement Memorandum of Understanding (MOU) the DOD has had with the UK since 1975.

■ **Business Systems – Definition and Administration:** DOD is issuing a second proposed rule to improve the effectiveness of Defense Contract Management Agency (DCMA) and Defense Contract Audit Agency (DCAA) oversight of contractor business systems.

The previous proposed rule (see the February 2010 ***Federal Contracts Perspective*** article "Proposed DFARS Changes Address Business Systems and Increased Acquisition Thresholds") would have defined covered business systems as accounting systems, earned value management systems, estimating systems, material management and accounting systems, property

management systems, and purchasing systems. If the administrative contracting officer (ACO) determined one of these systems was deficient, the ACO would be required to withhold 10% of each of the contractor's payments under the contract. Each deficient system would require the withholding of 10% – two deficient systems would require 20% withholding from each payment; three deficient systems would require 30% withholding from each payment; four deficient systems would require 40% withholding from each payment; and five deficient systems would require the maximum 50% withholding from each payment.

Twenty-five (25) respondents submitted comments on the original proposed rule. Based on those comments, DOD is publishing a second proposed rule to clarify the definition and administration of contractor business systems.

The following are the significant changes made in response to the comments:

- A $50 million threshold is established for DFARS 252.242-7XXX, Business Systems.

- In DFARS 252.242-7XXX, the 50% maximum withholding on payments is reduced to a maximum of 20% (a maximum of 10% for small businesses).

- DFARS 252.242-7XXX would have required the ACO to withhold 100% of payments "if the ACO determines that there are one or more system deficiencies that are highly likely to lead to improper contract payments being made, or represent an unacceptable risk of loss to the Government…" Respondents suggested that the proposed rule provided ACOs insufficient standards to make 100% withhold determinations, and did not provide adequate provisions for contractor responses. Therefore, this second proposed rule deletes the 100% withhold provision.

- DFARS 252.242-7YYY, Accounting System Administration, has been revised to clarify the criteria to be used to determine if a contractor has an acceptable accounting system (for example, "The contractor's accounting system shall be in compliance with applicable laws and ensure the proper recording, accumulating, and billing of costs on government contracts" is revised to "The Contractor's accounting system shall provide for a sound internal control environment and accounting framework and organizational structure that is adequate for producing accounting data that is reliable and costs that are recorded, accumulated, and billed on government contracts in accordance with contract terms").

- Some portions of the original proposed rule stated that a finding of system noncompliance would be withdrawn when the contractor has "substantially corrected" the system deficiencies, while other portions stated that the withhold would not be released until "all deficiencies have been corrected." The revised proposed rule settles on the "all deficiencies have been corrected" criteria.

Comments on the second proposed rule must be submitted no later than January 3, 2011, identified as "DFARS Case 2009-D038," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) e-mail: **dfars@osd.mil**; (3) fax: 703-602-0350; or (4) mail: Defense Acquisition Regulations Council, Attn: Mark Gomersall, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060.

■ **Government Property:** This proposed rule would revise DFARS Part 245, Government Property, to reflect the revisions to FAR Part 45, Government Property, made by FAC 2005-17 (the "FAR Part 45 Rewrite"). It would update and reorganize DFARS Subpart 245.6, Support Government Property Management; DFARS Subpart 245.70, Appointment of Property Administrators and Plant Clearance Officers; DFARS Subpart 245.71, Plant Clearance Forms; DFARS Subpart 245.72, Special Instructions; and DFARS Subpart 245.73, Sale of Surplus Contractor Inventory. In addition, a new property disposal clause, DFARS 252.245-70XX, Reporting, Reutilization and Disposal, would be added. DFARS 252.245-70XX would be included in solicitations and contracts that contain either FAR 52.245-1, Government Property, or FAR 52.245-2, Government Property Installation Operation Services.

Besides reorganizing DFARS Subpart 245.6 to reflect FAR Subpart 45.6, the following DFARS subparts would be updated and relocated:

- DFARS Subpart 245.70 would be relocated to DFARS 201.670, Appointment of Property Administrators and Plant Clearance Officers
- DFARS Subpart 245.71 would be relocated to become DFARS Subpart 245.70, Plant Clearance Forms
- DFARS Subpart 245.72 would be relocated to DFARS 245.602-1, Inventory Disposal Schedules, and the DFARS Procedures, Guidance, and Information (PGI)
- DFARS Subpart 245.73 would be relocated to DFARS 245.604-3, Sale of Surplus Property

Comments on the proposed rule must be submitted no later than February 1, 2011, identified as "DFARS Case 2009-D008," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) e-mail: **dfars@osd.mil**; (3) fax: 703-602-0350; or (4) mail: Defense Acquisition Regulations Council, Attn: Mary Overstreet, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060.

For more on the changes made by FAC 2005-17, see the June 2007 ***Federal Contracts Perspective*** article "FAR Coverage on Government Property Simplified, Clarified, Trimmed."

■ **Reporting of Government-Furnished Property:** This proposed rule would revise DFARS 211.274, Item Identification and Valuation Requirements, and DFARS 252.211-7007, Reporting of Government-Furnished Property, to expand reporting requirements for government-furnished property (GFP) to include items uniquely and non-uniquely identified, and to clarify policy for contractor access to government supply sources.

Currently, contractors are required to report to the DOD Item Unique Identification (IUID) Registry property that is classified as equipment, special tooling, and special test equipment items valued at $5,000 or more, and items valued at less than $5,000 when required in accordance with contract terms and conditions. This rule would revise DFARS 211.274-4, Policy for Reporting of Government-Furnished Property, to expand reporting requirements to include GFP that is both uniquely and non-uniquely identified regardless of value, except for the following:

- Contractor-acquired property as defined in FAR Part 45, Government Property
- Property under any statutory leasing authority

- Property to which the government has acquired a lien or title solely because of partial, advance, progress, or performance-based payments
- Intellectual property or software
- Real property

DFARS 252.211-7007 (which is currently titled "Reporting of Government-Furnished Equipment in the DOD Item Unique Identification (IUID) Registry") would require contractors to identify and report GFP with existing unique item identification to the DOD IUID Registry, and that all GFP without an existing unique item identification be reported to the DOD GFP Hub ("an automated data base for capturing records of government-furnished property sent on a non-reimbursable basis to a contractor without a unique item identifier assigned"). This clause would apply to commercial contracts that have GFP and reporting applicability. DFARS 252.211-7007 would be added to the list of solicitation provisions and contract clauses applicable to the acquisition of commercial items in DFARS 212.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items.

Finally, DFARS 252.251-7000, Ordering From Government Supply Sources, would be revised to require electronic receipts of property obtained from a government supply source.

Comments on the proposed rule must be submitted no later than February 22, 2011, identified as "DFARS Case 2009-D043," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) e-mail: **dfars@osd.mil**; (3) fax: 703-602-0350; or (4) mail: Defense Acquisition Regulations Council, Attn: Mary Overstreet, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060.

■ **Contractor Unique Identification:** This memorandum from the USD(AT&L) to the services' acquisition directors takes them to task for improperly identifying contractors:

> "Proper identification of contractors is essential to properly managing contracts. A review of data…found that at least 7% of the modifications and orders placed in the second quarter of fiscal year 2010 cited a different business unit from the one that was a party to the contract. Unless a modification for a novation or change of name agreement (see Federal Acquisition Regulation Subpart 42.12) has been completed, the contractor should be identified on each contract action using the same address, CAGE code and Data Universal Numbering System (DUNS) number as on the contract award. If a different contractor facility will be performing the work on a particular order, the contracting officer should place the CAGE code of that facility in the 'facility' or 'facility code' portion of the contractor block of the applicable form (*i.e.*, DD 1155 block 9, SF 26 block 7, SF 30 block 8, SF 33 block 15A, or SF 1449 block 17A).
>
> "Please conduct in service training to ensure that your contracting officers and contract specialists are aware of these rules. We will monitor compliance beginning in FY11 to determine if progress is being made."

PROMPT PAYMENT INTEREST RATE SET AT 2 5/8%

The Treasury Department has established 2 5/8% (2.625%) as the interest rate for the computation of payments made between January 1, 2011, and June 30, 2011, under the Prompt Payment Act and the Contracts Disputes Act. This rate is also used in facilities capital cost of money calculations. The interest rate for the prior six-month period (July 1, 2010, through December 31, 2010), was 3 1/8% (3.125%). The interest rate for January 1, 2010, through June 30, 2010, was 3 1/4% (3.25%).

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

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

MILEAGE REIMBURSEMENT SET AT 51¢/MILE FOR PRIVATE AUTOS

The General Services Administration (GSA) is reducing the mileage reimbursement rate for use of a privately owned automobile on official travel from 55¢ per mile to 51¢ per mile, and the rate for use of a motorcycle on official travel from 52¢ per mile to 48¢ per mile. The reimbursement rate for use of a privately owned aircraft remains the same at $1.29 per mile. These revised rates are effective for travel performed on or after January 1, 2011. Travel performed before January 1, 2011, will be reimbursed at the earlier rates.

By law, the automobile reimbursement rate cannot exceed the single standard mileage rate established by the Internal Revenue Service (IRS). The IRS announced a new mileage rate for automobiles of 51¢ per mile effective January 1, 2011, so GSA took action to decrease the automobile reimbursement rate as of January 1, 2011.

GSA formerly published the privately owned vehicle mileage reimbursement rates in the Federal Travel Regulations (FTR). However, it no longer does that, but instead posts the reimbursement rates on the Internet **at http://www.gsa.gov/ftr** in an FTR Travel/Per Diem Bulletin (the 2011 rates are in GSA Bulletin FTR 11-03 at **http://www.gsa.gov/graphics/ogp/FTRBulletin11-03508.doc**).

TREASURY PROPOSES UPDATE TO ACQUISITION REGULATIONS

The Department of the Treasury is proposing to amend the Department of the Treasury Acquisition Regulation (DTAR), first published on June 14, 2002, to update, revise, or remove, as applicable, outdated text and references; add new text to maintain consistency with the FAR; incorporate Treasury-specific policy associated with current FAR requirements; reflect the Treasury's organization and delegation of authorities; and make minor editorial changes.

Comments on the proposed revision must be submitted no later than February 15, 2011, by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) e-mail: fernando.tonolete@do.treas.gov; (3) fax: 202-622-2273; or (4) mail: Department of the Treasury, Office of the Procurement Executive, Attn: Fernando Tonolete, 1500 Pennsylvania Avenue, NW., Met. Square Room 6B517, Washington, DC 20220.

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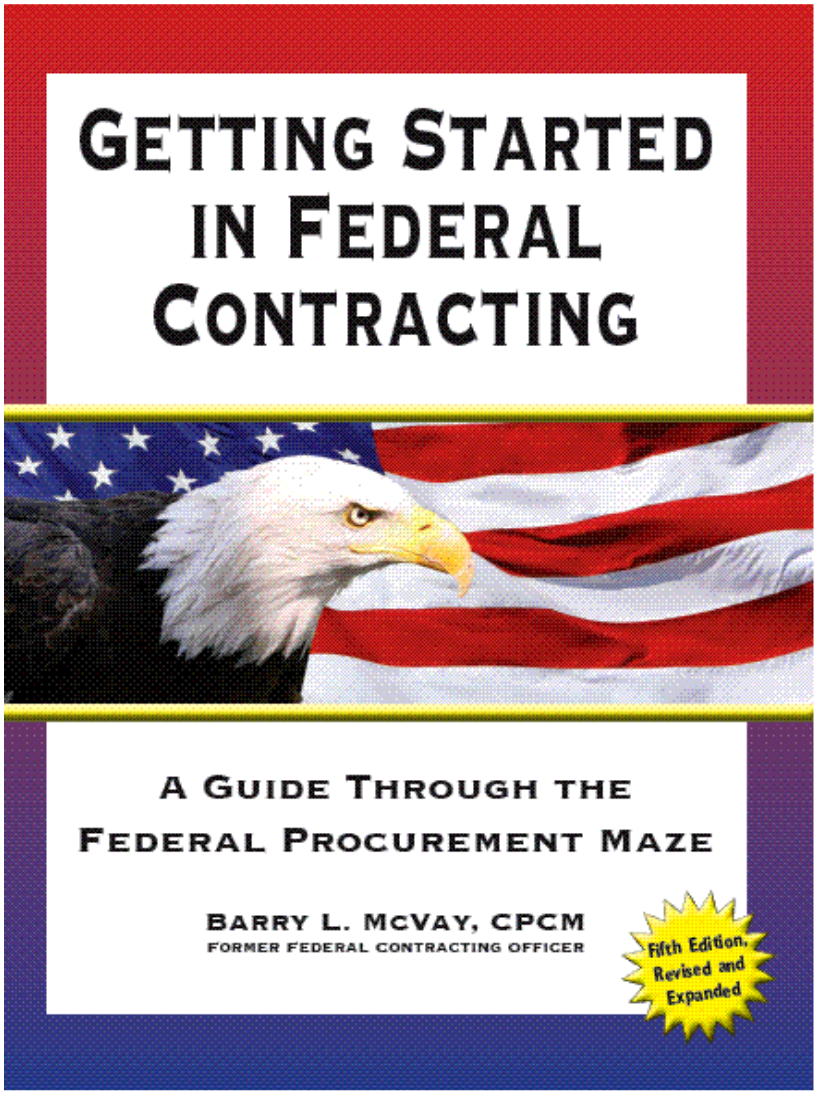

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