

# FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

Vol. XII, No. 10

October 2011

## OFPP ISSUES POLICY LETTER ON INHERENTLY GOVERNMENTAL AND CRITICAL FUNCTIONS

The Office of Federal Procurement Policy (OFPP) has released its long-awaited policy letter on managing the performance of inherently governmental and critical functions. The guidance is in response to the March 4, 2009, presidential memorandum titled “Government Contracting,” which directed the Office of Management and Budget (OMB) to “clarify when governmental outsourcing for services is and is not appropriate, consistent with Section 321 of Public Law 110-417 [the Fiscal Year 2009 National Defense Authorization Act]” [OFPP is part of OMB]. Section 321 requires OMB to: (1) create a single definition for the term “inherently governmental function” that addresses any deficiencies in the existing definitions and reasonably applies to all agencies; (2) establish criteria to be used by agencies to identify “critical functions” and positions that should only be performed by federal employees; and (3) provide guidance to improve internal agency management of functions that are inherently governmental or critical.

CONTENTS	
Inherently Governmental Functions Policy Issued....	1
13 Items Proposed for Biobased Designation.....	3
Rule on SDB Program Constitutionality Proposed ...	5
COFC Agrees Limit on IDIQ Protests Expired .....	6
Approval of GWACs, MACs, BPAs Required.....	7

OFPP Policy Letter 11-01 provides the following guidance:

- *It clarifies what functions are inherently governmental and must always be performed by federal employees.* The policy letter provides a single definition of “inherently governmental function” built around the well-established statutory definition in Section 5 of Public Law 105-270, Federal Activities Inventory Reform Act of 1998 (the FAIR Act). The FAIR Act defines an activity as inherently governmental when it “is so intimately related to the public interest as to mandate performance by federal government employees.” The policy letter provides the following definition for “inherently governmental function”:

“Inherently governmental function,” as defined in Section 5 of the Federal Activities Inventory Reform Act, Public Law 105-270, means a function that is so intimately related to the public interest as to require performance by federal government employees.

- (a) The term includes functions that require either the exercise of discretion in applying federal government authority or the making of value judgments in making decisions for the federal government, including judgments relating to monetary transactions and entitlements. An inherently governmental function

involves, among other things, the interpretation and execution of the laws of the United States so as: (1) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise; (2) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise; (3) to significantly affect the life, liberty, or property of private persons; (4) to commission, appoint, direct, or control officers or employees of the United States; or (5) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriations and other federal funds.

- (b) The term does not normally include: (1) gathering information for or providing advice, opinions, recommendations, or ideas to federal government officials; or (2) any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services).

The definition provided by this policy letter will replace existing definitions in regulation and policy, including the Federal Acquisition Regulation (FAR). The policy letter provides examples and tests to help agencies identify inherently governmental functions.

- *It explains what agencies must do when work is “closely associated” with inherently governmental functions.* Specifically, when functions that generally are not considered to be inherently governmental but approach being in that category because of the nature of the function and performance may impinge on federal officials’ performance of an inherently governmental function, agencies must give special consideration to using federal employees to perform those functions. If contractors are used to perform such work, agencies must give special management attention to contractors’ activities to guard against their expansion into inherently governmental functions. The policy letter includes examples to help agencies identify closely associated functions and a checklist of responsibilities that must be carried out when agencies rely on contractors to perform these functions. For example, the determination of requirements during acquisition planning is inherently governmental; the conduct of market research is closely associated with inherently governmental functions. If a contractor is conducting market research, the agency must “limit or guide a contractor’s exercise of discretion and retain control of government operations by both (i) establishing in the contract specified ranges of acceptable decisions and/or conduct; and (ii) establishing in advance a process for subjecting the contractor’s discretionary decisions and conduct to meaningful oversight and, whenever necessary, final approval by an agency official...”

Vivina McVay, Editor-in Chief

©2011 by Panoptic Enterprises. All rights reserved. Reproduction, photocopying, storage, or transmission by any means is prohibited by law without the express written permission of Panoptic Enterprises. Under no circumstances should the information contained in *Federal Contracts Perspective* be construed as legal or accounting advice. If a reader feels expert assistance is required, the services of a professional counselor should be retained.

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

- *It requires agencies to identify their “critical functions” in order to ensure they have sufficient internal capability to maintain control over functions that are core to the agency’s mission and operations.* The policy letter holds an agency responsible for making sure it has an adequate number of positions filled by federal employees with appropriate training, experience, and expertise to understand the agency’s requirements, formulate alternatives, manage work product, and monitor any contractors used to support the federal workforce. Federal officials must evaluate, on a case-by-case basis, whether they have sufficient internal capability, taking into account factors such as the agency’s mission, the complexity of the function, the need for specialized staff, and the potential impact on mission performance if contractors were to default on their obligations.
- *It outlines a series of agency management responsibilities to strengthen accountability for the effective implementation of these policies.* Agencies must take specific actions, before and after contract award, to prevent contractor performance of inherently governmental functions and overreliance on contractors in “closely associated” and critical functions. Agencies are also required to develop agency-level procedures, provide training, and designate senior officials to be responsible for implementation of these policies.

For more on the acquisition-related portions of Public Law 110-417, see the November 2008 *Federal Contracts Perspective* article “2009 Defense Authorization Act Includes Clean Contracting Act.” For more on the presidential memorandum, see the April 2009 *Federal Contracts Perspective* article “Obama Directs More Fixed-Price Contracts and Fewer Sole Source Contracts.”

## **THIRTEEN MORE ITEMS PROPOSED FOR BIOBASED DESIGNATION**

The United States Department of Agriculture (USDA) is proposing to add thirteen (13) more sections to Title 7 of the Code of Federal Regulations (CFR), Part 3201, Guidelines for Designating Biobased Products for Federal Procurement (7 CFR Part 3201), to be given preference in federal procurements as provided under Section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA) (Public Law 107-171), and to specify the minimum level of biobased content to be contained in the procured products.

The following are the proposed new designated items and their Title 7 section numbers:

- 3201.75, Air fresheners and deodorizers
- 3201.76, Asphalt and tar removers
- 3201.77, Asphalt restorers
- 3201.78, Blast media
- 3201.79, Candles and wax melts
- 3201.80, Electronic components cleaners
- 3201.81, Floor coverings (non-carpet)
- 3201.82, Foot care products
- 3201.83, Furniture cleaners and protectors
- 3201.84, Inks
- 3201.85, Packaging and insulating materials

3201.86, Pneumatic equipment lubricants  
3201.87, Wood and concrete stains

As a general rule, procuring agencies must purchase biobased products within these designated items where the purchase price of the procurement item exceeds \$10,000 or where the quantity of such items or functionally equivalent items purchased over the preceding fiscal year equaled \$10,000 or more, unless products within a designated item: (1) are not reasonably available within a reasonable period of time; (2) fail to meet the reasonable performance standards of the procuring agencies; or (3) are available only at an unreasonable price. The \$10,000 threshold applies to federal agencies as a whole and not to agency subgroups such as regional offices or subagencies of the larger federal department or agency.

For more information on the biobased program, all the products in the program, and those proposed for inclusion, go to <http://www.biopreferred.gov/>. Also see the February 2005 *Federal Contracts Perspective* article “USDA Publishes Biobased Products Guidelines”; the August 2005 *Federal Contracts Perspective* article “Agriculture Proposes Six Biobased Items”; the April 2006 *Federal Contracts Perspective* article “USDA Designates Six Biobased Products for Procurement”; the September 2006 *Federal Contracts Perspective* article “USDA Proposes 20 More Biobased Products”; the November 2006 *Federal Contracts Perspective* article “10 More Biobased Items Proposed”; the June 2008 *Federal Contracts Perspective* article “USDA Adds 27 Items to Biobased Products List, Exempts DOD and NASA from Requirements”; the November 2008 *Federal Contracts Perspective* article “Nine More Biobased Items Proposed”; the November 2009 *Federal Contracts Perspective* article “USDA Adds Nine More Biobased Items”; the March 2010 *Federal Contracts Perspective* article “USDA Proposes Another Nine Biobased Items”; the November 2010 *Federal Contracts Perspective* article “Eight More Biobased Products Designated”; and the December 2010 *Federal Contracts Perspective* article “Fourteen More Items Proposed for Biobased Designation.”

**NOTE:** On August 29, 2011, the USDA published in the *Federal Register* a rule relocating the regulations governing the biobased program from 7 CFR Chapter XXIX to 7 CFR Chapter XXXII effective October 28, 2011. As a result, all 2902 section numbers designated items for the biobased program are now 3201 section numbers; for example, Section 2902.65, Concrete and asphalt cleaners, is now Section 3201.65.

**Visit <http://www.FedGovContracts.com>**

**for more information on the rapidly-changing world  
of federal contracting!**

## RULE ON SDB PROGRAMS' CONSTITUTIONALITY PROPOSED

Changes to the FAR are being proposed to address the effect of the United States Court of Appeals for the Federal Circuit decision in *Rothe Development Corporation vs. the Department of Defense [DOD] and the U.S. Department of the Air Force [USAF]* (CAFC 2008-1017, November 4, 2008) on small disadvantaged businesses (SDBs) and certain institutions of higher education. The decision declared that Title 10 of the U.S. Code, Section 2323 (10 USC 2323), which is implemented by FAR Subpart 19.11, Price Evaluation Adjustment for Small Disadvantaged Business Concerns, by providing a 10% evaluation preference to offers submitted by SDBs, was unconstitutional on the grounds that it violates the right to equal protection by basing preferential treatment on race.

The proposed rule would remove FAR Subpart 19.11 and FAR Subpart 19.12, Small Disadvantaged Business Participation Program; remove the corresponding clauses at FAR 52.219-22, Small Disadvantaged Business Status, FAR 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, FAR 52.219-24, Small Disadvantaged Business Participation Program – Targets, FAR 52.219-25, Small Disadvantaged Business Participation Program – Disadvantaged Status and Reporting, and FAR 52.219-26, Small Disadvantaged Business Participation Program – Incentive Subcontracting; and remove references to FAR Subpart 19.11, 19.12, and the corresponding clauses elsewhere in the FAR.

Regarding FAR Subpart 19.12 and supporting clauses addressing the award of subcontracts to SDBs, certain authorities are based on the Small Business Act and not 10 USC 2323, so they were not at issue in the *Rothe* decision and retain their legal status. These include FAR 19.1202 Evaluation Factor or Subfactor (to evaluate the participation of small businesses as subcontractors), and FAR 19.1203, Incentive Subcontracting with Small Disadvantaged Business Concerns (which permits award of monetary incentives to prime contractors to encourage subcontracting opportunities to SDBs). These are proposed to be moved to FAR Subpart 19.7, The Small Business Subcontracting Program, because FAR Subpart 19.7 addresses subcontracting issues in general, including the use of monetary incentives to encourage subcontracting opportunities. Therefore, this realignment would consolidate coverage on subcontracting with small businesses in one place.

Regarding FAR 19.1202, FAR Subpart 19.7 is silent on its use. Nothing in this rulemaking precludes an agency from using evaluation factors and subfactors for subcontracting during source selections. The Small Business Administration's (SBA's) regulations in paragraph (g) of Title 13 of the Code of Federal Regulations (CFR), Section 125.3, Subcontracting Assistance, allow the application of evaluation factors and subfactors to subcontracting with any of the small business programs, including, but not limited to, SDBs. The Federal Acquisition Regulatory Council will confer with SBA to evaluate the need for guidance in the FAR on the use of evaluation factors and subfactors for subcontracting.

Comments on this proposed rule must be submitted no later than November 8, 2011, identified as "FAR Case 2009-016," by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) fax: 202-501-4067; or (3) mail to: General Services Administration, Regulatory Secretariat (MVCB), Attn: Hada Flowers, 1275 First Street, NE, 7th Floor, Washington, DC 20417.

For more on *Rothe*, see the January 2009 *Federal Contracts Perspective* "Court Strikes Down DOD's Small and Disadvantaged Business Contract Goal," and the April 2009 *Federal Contracts Perspective* article "DOD Ordered to Cease Giving Preference to SDBs." For more on

a FAR deviation that prohibits DOD contracting officers from using FAR Subpart 19.11, see the April 2010 *Federal Contracts Perspective* article “Multitude of DOD Regulations and Deviations Issued.”

## COFC AGREES LIMIT ON IDIQ PROTESTS HAS EXPIRED

The United States Court of Federal Claims (COFC) agrees with the Government Accountability Office (GAO) that GAO’s exclusive authority to hear protests against task or delivery orders under indefinite-delivery/indefinite-quantity (IDIQ) contracts that exceed \$10,000,000 has expired, and that the prohibition against COFC’s reviewing such protests has been eliminated (*MED Trends, Inc., v. The United States and Microtechnologies, LLC*, 11-420, September 13, 2011).

Title 28 of the United States Code, Section 1491, paragraph (b)(1) (28 USC 1491(b)(1)) provides the COFC the following jurisdiction to hear protests: “Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.”

However, in 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which placed the following limits on protests of task or delivery orders placed under IDIQ contracts: “A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.” This was added to the U.S. Code as 41 USC 253j(e).

In 2008, Congress modified FASA’s bar on protests of task or delivery orders with the passage of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) (NDAA), to add another limited exception to FASA’s general bid protest preclusion: task orders valued over \$10,000,000 could be protested to the GAO. Also, a three-year sunset provision was inserted. Section 843(b) of the NDAA directed that the following be substituted for 41 USC 253j(e):

(e) Protests.

- (1) A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for: (A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or (B) a protest of an order valued in excess of \$10,000,000.
- (2) ...the Comptroller General of the United States [that is, the GAO] shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).
- (3) This subsection shall be in effect for three years, beginning on the date that is 120 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2008 [that is, May 27, 2011, three years and 120 days after the January 29, 2008, enactment of the NDAA).

On January 4, 2011, 41 USC 253j(e) was recodified as 41 USC 4106(f).

On June 24, 2011, MED Trends, Inc., filed a protest against the award of a task order under the Veterans Technology Services Government-Wide Acquisition Contract (VETS GWAC), an IDIQ between the General Services Administration (GSA) and a pool of pre-qualified contractors. The question regarding jurisdiction had to be addressed first: (1) did the sunset provision, which was added by the NDAA, apply only to the expansion of GAO’s jurisdiction in 41 USC 4106(f)(1)(B) and (f)(2); or (2) did it apply to paragraph (f) in its entirety?

In June 2011, GAO ruled that the sunset provision applied to the entire 41 USC 4106(f), not just the expansion of GAO’s jurisdiction (see the July 2011 *Federal Contracts Perspective* article “GAO Rules Limits on IDIQ Protests Have Expired”). With the expiration of paragraph (f), GAO concluded that there were no limits on its ability to hear protests against any task or delivery order.

COFC agreed with GAO that all of paragraph (f) had expired on May 7, 2011, and since the case had been filed on June 24, 2011, its authority to hear protests reverted to that specified in 28 USC 1491(b)(1), meaning there were no longer any restrictions:

“There is no question that, had this protest been brought one month earlier, the court would not have been able to exercise jurisdiction. Under the Federal Acquisition Streamlining Act of 1994 (“FASA”), as amended, protests of FASA task orders (other than those challenging an increase in scope) could be brought only before the Government Accountability Office (“GAO”), and then only if the amount in controversy exceeded \$10,000,000...Plaintiff contends that, because the time prescribed in subsection (f) expired on May 27, 2011, the jurisdictional bar to court review of such protests has been eliminated. In the absence of subsection (f), there is nothing that prevents this court from exercising its general bid protest jurisdiction under 28 USC 1491(b)(1).”

One final note about this decision: after deciding that it had jurisdiction to hear and decide the case, COFC ruled against MED Trends and in favor of the government.

## **APPROVAL OF CERTAIN GWACs, MACs, BPAs NOW REQUIRED**

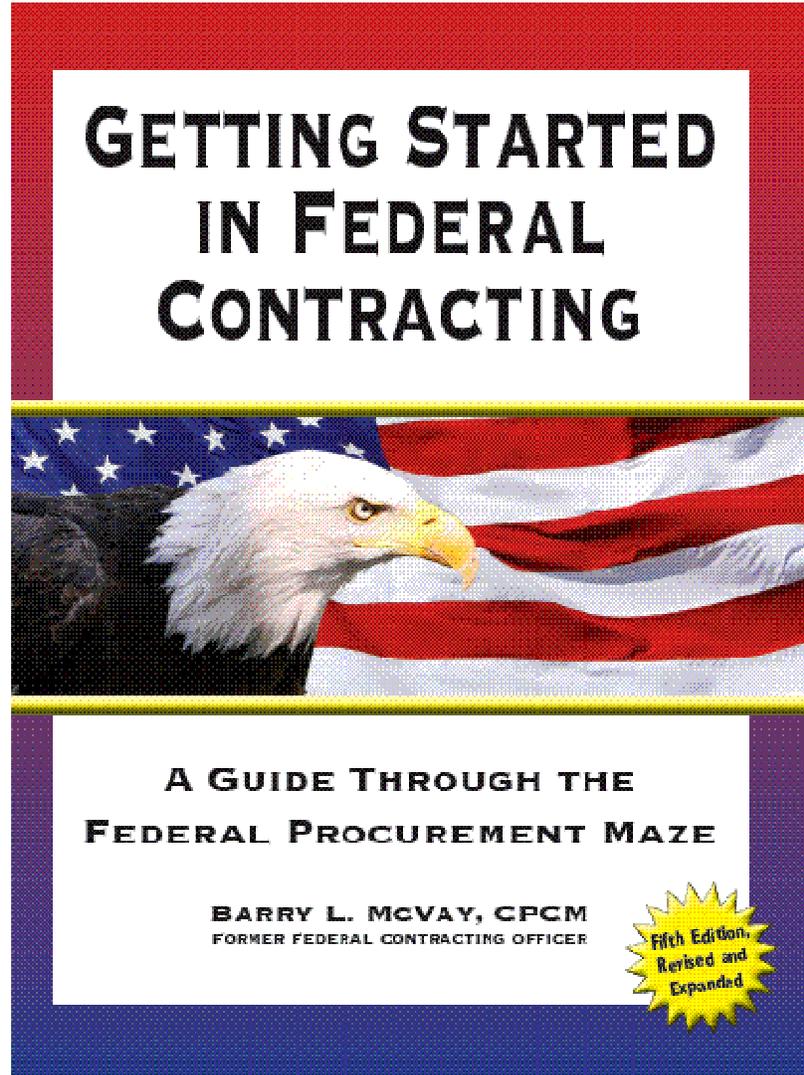
Daniel Gordon, Administrator of the Office of Federal Procurement Policy (OFPP), has issued a memorandum to all chief acquisition officers and senior procurement executives requiring the preparation and approval of business cases for new and renewed government-wide acquisition contracts (GWACs), multi-agency contracts (MACs), blanket purchase agreements (BPAs), and agency-specific IDIQ contracts. Administrator Gordon considers this because “too often, agencies establish new overlapping and duplicative contracts for supplies or services, because the agencies have not adequately considered the suitability of existing interagency contract vehicles...”

The new business case procedures apply to acquisitions that enter the solicitation phase after December 31, 2011, and meet the following thresholds:

*GWACs:* all, regardless of estimated value

*MACs, agency-specific IDIQ contracts, and BPAs:*

January 1, 2012 - September 30, 2012:	\$250,000,000
Fiscal Year 2013:	\$100,000,000
Fiscal Year 2014:	\$50,000,000



426 pages, 2009, ISBN: 978-1-912481-26-5, \$49.95  
from Panoptic Enterprises (<http://www.FedGovContracts.com>) and  
from Amazon.com

To see: Table of Contents, go to <http://www.FedGovContracts.com/contents.pdf>  
Index, go to <http://www.FedGovContracts.com/index.pdf>

Sample Chapters: Chapter 11, Set-Asides and Preference Programs, go to  
<http://www.FedGovContracts.com/chap11.pdf>  
Chapter 13, Federal Supply Schedules, go to  
<http://www.FedGovContracts.com/chap13.pdf>