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PUBLIC PERMITTED ACCESS TO FEDERAL AWARDEE PERFORMANCE AND INTEGRITY INFORMATION SYSTEM

Federal Acquisition Circular (FAC) 2005-49 amends the Federal Acquisition Regulation (FAR) to implement Section 3010 of the Supplemental Appropriations Act, 2010 (Public Law 111-212), which requires that all information contained in the Federal Awardee Performance and Integrity Information System (FAPIIS) (<http://www.ppirs.gov/fapiis.html>), excluding past performance reviews, be posted on a publicly available website. This interim rule adds FAR 52.209-9, Updates of Publicly Available Information Regarding Responsibility Matters, to notify contractors that FAPIIS data, excluding past performance reviews, will be available to the public after April 15, 2011.

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Section 872 of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417) required the establishment of a data system containing specific information on the integrity and performance of those awarded a federal contract or grant in excess of \$500,000. FAPIIS is the data system that was developed.

FAPIIS is intended to enhance the scope of information available to contracting officers as they evaluate the integrity and performance of prospective contractors. FAPIIS gathers, into one database, information on debarments and suspensions, past performance information, contracting officers' nonresponsibility determinations, contract terminations for default or cause, agency defective pricing determinations, and contractor self-reporting of criminal convictions, civil liability, and adverse administrative actions.

FAC 2005-40 implemented Section 872 by adding FAR 9.104-6, Federal Awardee Performance and Integrity Information System, a solicitation provision at FAR 52.209-7, Information Regarding Responsibility Matters, and a contract clause at FAR 52.209-8, Updates of Information Regarding Responsibility Matters. FAC 2005-40 required covered contractors to confirm, at the time of offer submission, information pertaining to criminal, civil and administrative proceedings through which a determination of fault was made, and to report this information into FAPIIS; and to update the information in FAPIIS on a semi-annual basis throughout the life of the contract.

Section 872(e)(1) restricted the information in FAPIIS to "to appropriate acquisition officials of federal agencies and to such other government officials as appropriate." This was reflected in FAR 52.209-8 ("With the exception of the contractor, only government personnel and authorized

users performing business on behalf of the government will be able to view the contractor's record in the system. Public requests for system information will be handled under Freedom of Information Act [FOIA] procedures..."). However, Section 3010 modifies Section 872(e)(1) to require that all FAPIIS information, excluding past performance reviews, be posted in a "publicly available website." Therefore, FAC 2005-49 adds FAR 52.209-9 to replace FAR 52.209-8. FAR 52.209-9 is practically a duplicate of FAR 52.209-8 except that FAR 52.209-9 does not contain the FAR 52.209-8 statement, instead providing notice to contractors that all information posted in FAPIIS on or after April 15, 2011, except past performance reviews, will be publicly available. FAR 52.209-9 also states that requests to review the information posted in FAPIIS before April 15, 2011, will be subject to the FOIA process.

FAC 2005-49 applies to solicitations issued on or after January 24, 2011. Contracting officers are encouraged, to the extent feasible, to amend existing solicitations to include FAR 52.209-9 in contracts to be awarded on or after January 24, 2011. Prior to April 15, 2011, contracting officers are to bilaterally modify existing contracts, including indefinite-delivery indefinite-quantity (IDIQ) contracts, that contain FAR 52.209-8, if a semi-annual update will be due on or after April 15, 2011. The modification is to replace FAR 52.209-8 with FAR 52.209-9, Alternate I. If the contracting officer is unable to negotiate this modification prior to April 15, 2011, the contracting officer is to obtain approval at least one level above the contracting officer to negotiate an alternate resolution.

Comments on this interim rule must be submitted no later than March 25, 2011, identified as "FAC 2005-49, FAR Case 2010-016," by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) fax: 202-501-4067; or (3) mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE, Washington, DC 20417.

For more information on Section 872, see the November 2008 *Federal Contracts Perspective* article "2009 Defense Authorization Act Includes Clean Contracting Act." For more on FAC 2005-40, see the April 2010 *Federal Contracts Perspective* article "Contracting Officers to Check Federal Awardee Performance and Integrity Information System." For more on Section 3010, see the August 2010 article "Two New Laws Will Affect Contractors."

EDITOR'S NOTE: According to the introduction to FAC 2005-49, "The Managers of the FAPIIS system...are making changes to the FAPIIS architecture to support the transparency requirements of Section 3010. The current architecture, consistent with the rule effective on April 22, 2010 [that is, FAC 2005-40], provides a one-stop information system to help acquisition officials make informed decisions about an offeror's business integrity, but lacks the functionality to make information immediately available to the public as it is posted in the system. On and after April 15, 2011, when system changes are completed, information posted to FAPIIS by offerors, contractors, and government personnel will be publicly available in accordance with Section 3010."

Vivina McVay, Editor-in Chief

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DEFENSE AUTHORIZATION ACT ENACTED

On January 7, President Obama signed into law the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383). As usual, Title VIII, Acquisition Policy, Acquisition Management, and Related Matters, has several provisions of interest to the acquisition community, particularly those in the Department of Defense (DOD).

■ **Section 825, Extension of Sunset Date for Certain Protests of Task and Delivery Order Contracts:** The expiration date for the authority to file protests against task or delivery orders that either (1) increases the scope, period, or maximum value of the contract under which the order is issued, or (2) is valued in excess of \$10,000,000, is extended from May 27, 2011 (three years plus 120 days after enactment of Public Law 110-181) to September 30, 2016.

■ **Section 863, Requirements for the Acquisition of Services:** The military services and defense agencies must review and validate each requirement for services anticipated to cost in excess of \$10,000,000 to identify unneeded or low priority requirements that can be reduced or eliminated, with the savings transferred to higher priority objectives.

■ **Section 864, Review of Defense Acquisition Guidance:** DOD is required to review its acquisition guidance, including DOD Instruction 5000.02, Operation of the Defense Acquisition System. The review is to consider:

- The extent to which the acquisition of commercial goods and commodities, commercial and military unique services, and information technology should be addressed in DOD Instruction 5000.02 and other guidance primarily relating to the acquisition of weapon systems, or should be addressed in separate instructions and guidance;
- Whether long-term sustainment and energy efficiency of weapon systems is appropriately emphasized;
- Whether appropriate mechanisms exist to communicate information relating to the mission needs of DOD to the industrial base in a way that allows the industrial base to make appropriate investments in infrastructure, capacity, and technology development to help meet such needs; and
- The extent to which earned value management should be required on acquisitions not involving the acquisition of weapon systems and whether measures of quality and technical performance should be included in any earned value management system.

■ **Section 865, Requirement to Review References to Services Acquisition Throughout the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement:**

DOD, in consultation with the Office of Federal Procurement Policy (OFPP) and other federal agencies selected by the Secretary of Defense, shall review the FAR and the Defense Federal Acquisition Regulation Supplement (DFARS) to ensure that they include appropriate guidance for and references to services acquisition that are in addition to references provided in FAR Part 37, Service Contracting, and DFARS Part 237. The review will consider the extent to which additional guidance is needed “(1) to provide the tools and processes needed to assist contracting officials in addressing the full range of complexities that can arise in the acquisition of services; and (2) to enhance and support the procurement and project management community in all aspects of the process for the acquisition of services, including requirements development, assessment of reasonableness, and post-award management and oversight.”

VETERAN OWNERS DON'T HAVE TO WORK FULL-TIME

The Department of Veterans Affairs (VA) will no longer require the owners of veteran-owned small businesses (VOSBs), including service-disabled veteran-owned small businesses (SDVOSBs) to work full-time in that business to be eligible for benefits reserved by the VA for such businesses.

VA published a final rule that added a new Part 74, Veterans Small Business Regulations, to Title 38, Pensions, Bonuses, and Veterans' Relief, of the Code of Federal Regulations (38 CFR Part 74) (see the March 2010 *Federal Contracts Perspective* article "Veteran Business Status Verification Rule Finalized"). However, the final rule wasn't entirely final – it added several "interim final requirements" and asked for additional comments on those interim final requirements. Those requirements were: (1) that eligible owners work full-time in the business for which they have applied for acceptance in the Verification Program; (2) revised the time period for issuance of reconsideration decisions from 30 to 60 days; and (3) changed the distribution of profits for limited liability companies and employee stock ownership plans.

More than 100 comments were submitted on the interim final requirements. As a result of those comments, VA is: (1) rescinding the requirement that owners work full-time in the business for which they have applied for acceptance in the verification program and which limit participants to a single business; (2) adopting the 60 day time period for issuance of reconsideration decisions; and (3) changing the distribution of profits for limited liability companies (LLC) and employee stock ownership plans (ESOP).

DOT IMPROVES DBE PROGRAM

The Department of Transportation (DOT) is improving the Disadvantaged Business Enterprise (DBE) program by increasing accountability for recipients with respect to meeting overall goals, modifying and updating certification requirements, adjusting the personal net worth threshold for inflation, providing for expedited interstate certification, adding provisions to foster small business participation, improving post-award oversight, and addressing other issues.

DOT's DBE program is intended to provide contracting opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals in DOT's highway, mass transit, and airport financial assistance programs operated by the Federal Highway Administration, the Federal Transit Administration, and the Federal Aviation Administration, respectively. The DBE program regulations are in Title 49 of the Code of Federal Regulation (CFR), Part 26, Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs (49 CFR Part 26).

In 2009, DOT issued an advance notice of proposed rulemaking (ANPRM) concerning several DBE program issues: (1) the counting of items obtained by a DBE subcontractor from its prime contractor; (2) ways of encouraging "unbundling" of contracts to facilitate participation by small businesses, including DBEs; (3) potential improvements to the DBE application form; (4) suggestions for improving program oversight; (5) potential regulatory action to facilitate certification for firms seeking to work as DBEs in more than one state; and (6) additional limitations on the discretion of prime contractors to terminate DBEs for convenience, once the prime contractor had committed to using the DBE as part of its showing of good faith efforts (see the May 2009 *Federal Contracts Perspective* article "Transportation Adjusts DBE Size Standards"). DOT received 30 comments in response to the ANPRM.

Then, in 2010, DOT issued a notice of proposed rulemaking (NPRM) seeking further comments on proposals based on the ANPRM and proposing new provisions. The NPRM proposed an inflationary adjustment of the personal net worth (PNW) cap to \$1.3 million, additional measures to hold recipients accountable for their performance in achieving DBE overall goals, and amendments to the certification-related provisions of the DBE regulation. DOT received approximately 160 comments in response to the NPRM.

Based on the comments, DOT is making the following major changes to the DBE program:

- Section 26.39, Fostering small business participation, is added, which requires recipients to “include an element [to their DBE program] to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.”
- Section 26.47, Can recipients be penalized for failing to meet overall goals?, is revised to provide that, if a recipient fails to meet its overall goal, it has to analyze the shortfall, explain the reasons for it, and establish specific steps and milestones to correct the problems.
- Section 26.53, What are the good faith efforts procedures recipients follow in situations where there are contract goals?, is revised to prohibit prime contractors that, in the course of meeting its good faith efforts requirements on a procurement involving a contract goal, had submitted the names of one or more DBEs to work on the project, from terminating a DBE firm without the written consent of the recipient. The firm could be terminated only for good cause. “Good cause” includes the following circumstances: (1) the listed DBE subcontractor fails or refuses to execute a written contract; (2) the listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards; (3) the listed DBE subcontractor fails or refuses to meet the prime contractor’s reasonable, nondiscriminatory bond requirements; (4) the listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness; (5) the listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings; (6) the contractor determines that the listed DBE subcontractor is not a responsible contractor; (7) the listed DBE subcontractor voluntarily withdraws from the project and provides a written notice of its withdrawal; (8) the listed DBE is ineligible to receive DBE credit for the type of work required; (9) a DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract; and (10) other documented good cause that compels the prime contractor to terminate the DBE subcontract.
- In Section 26.67, What rules determine social and economic disadvantage?, the personal net worth limitation is increased from \$750,000 to \$1,320,000.
- Section 26.83, What procedures do recipients follow in making certification decisions?, a recipient may conduct a certification review of a certified DBE every three years (“or sooner if appropriate in light of changed circumstances”).
- Section 26.85, Interstate certification, is revised to provide that “when a firm currently certified in its home state (‘State A’) applies to another state (‘State B’) for DBE certification, State B may, at its discretion, accept State A’s certification and certify the firm, without further procedures.” State B then has 60 days to certify the firm or send to the applicant firm a notice stating the reasons for not certifying.

NEW NASA RULES ON GOVERNMENT PROPERTY, IT SECURITY

The National Aeronautics and Space Administration (NASA) has issued two final rules revising the NASA FAR Supplement (NFS): (1) to bring NFS Part 1845, Government Property, into conformance with FAR Part 45 as rewritten by FAC 2005-17; and (2) to update NFS 1804.470-3, IT [Information Technology] Security Requirements, and the corresponding clause NFS 1852.204-76, Security Requirements for Unclassified Information Technology Resources, so they are consistent with current federal policies for the security of unclassified information and information systems.

■ **Government Property:** This final rule brings NFS Part 1845 into consistency with the FAR as revised by FAC 2005-17. FAC 2005-17 significantly rewrote FAR Part 45, Government Property, and changed property-related definitions, provisions, and clauses that are required to be used in all solicitations and contracts issued after the effective date of June 14, 2007 (see the June 2007 *Federal Contracts Perspective* article “FAR Coverage on Government Property Simplified, Clarified, Trimmed”).

FAC 2005-17 rewrote FAR Part 45 to simplify government property procedures, clarify language, eliminate obsolete requirements related to the management and disposition of government property in the possession of contractors, and reduce 19 clauses to three.

This rule adopts as final, with changes, the proposal to rewrite NFS Part 1845 and the corresponding provisions and clauses so they align with the revised FAR Part 45, and foster efficiency, flexibility, innovation, and creativity while continuing to protect the Government’s interest. In addition, this final rule includes NASA procedures, solicitation provisions, and contract clause language necessary to identify contractor-acquired assets that become capital assets of the government to comply with Statement of Federal Financial Accounting Standard (SFFAS) No. 6, Accounting for Property, Plant, and Equipment.

Three respondents submitted comments on the proposed rule (see the January 2009 *Federal Contracts Perspective* article “NASA to Rewrite Government Property, IT Security Regulations”), and the following are the significant changes made to the final rule:

- Paragraph (b)(5) of NFS 1845.107-70, NASA Solicitation Provisions and Contract Clauses, is clarified to differentiate between government property acquired which the government has title to and property acquired under FAR 52.245-1, Government Property, Alternate 2, which is titled to the contractor by adding “government” to the following sentence: “For contractors with both onsite and offsite performance requirements, contracting officers shall list *government* property provided for offsite use separately in the contract.”
- The last sentence of paragraph (b)(iii) of NFS 1852.245-71, Installation-Accountable Government Property, is deleted so it is clear that contractors are not required to establish a property record until the property is titled to the government (“The contractor is accountable for all contractor-acquired property until the property is transferred to the government’s accountability”).
- Paragraph (c) of NFS 1852.245-72, Liability for Government Property Furnished for Repair or Other Services, is revised to delete the italicized language from the first sentence: “The contractor shall be liable for any loss, damage, or destruction of the

government property furnished for servicing when caused by the contractor's failure to exercise such care and diligence as a reasonable prudent owner of similar property would exercise under similar circumstances, *or when sustained while the property is being worked upon and directly resulting from that work, including, but not limited to, any repairing, adjusting, inspecting, servicing, or maintenance operation.*"

- NFS 1852.245-72(d), which addresses insurance requirements, is deleted since it conflicts with FAR Part 45.
- The requirement in paragraph (d)(3) of NFS 1852.245-74, Identification and Marking of Government Equipment, that the contractor provide the "date last serviced" for items physically transferred is deleted.
- The first two sentences of paragraph (a) of NFS 1852.245-79, Records and Disposition Reports for Government Property with Potential Historic or Significant Real Value, are deleted because they are "commentary" ("Items of government property flown in space or used to support other pioneering NASA programs have increased probability of historic significance and an intrinsic value that is likely to exceed their unused material or physical value. Descriptions of physical characteristics alone are often insufficient to determine an item's historic significance or real value.").
- NFS 1852.245-79(c) is modified to change "The Contractor shall not remove NASA identification or markings from government-furnished property prior to disposition without the advanced written approval of the NASA Industrial Property Officer" to "The Contractor shall not remove NASA identification or markings from government property prior to or during disposition without the advanced written approval of the Plant Clearance Officer."

■ **IT Security Requirements:** This final rule revises NFS 1804.470, Security Requirements for Unclassified Information Technology (IT) Resources, and the corresponding clause NFS 1852.204-76, Security Requirements for Unclassified Information Technology Resources, to update requirements related to IT security consistent with federal policies for the security of unclassified information and information systems. The rule imposes no new requirements. Its purpose is to define applicability more clearly, update procedural processes, eliminate the requirement for contractor personnel to meet the NASA System Security Certification Program, and provide a hyperlink to a library where contractors can find all underlying regulations and referenced documents (<http://www.nasa.gov/offices/ocio/itsecurity/index.html> – see paragraph (b) of NFS 1804.470-3, IT Security Requirements, and NFS 1852.204-76(b)).

Two respondents submitted comments on the proposed rule (see the January 2009 *Federal Contracts Perspective* article "NASA to Rewrite Government Property, IT Security Regulations"). In response to those comments, NFS 1852.204-76 is revised to remove the requirement that the contractor represent upon contract completion that all NASA electronic information has been purged from the contractor's IT systems because the requirement is unworkable.

UPDATE OF FPDS PRODUCT SERVICE CODE MANUAL PROPOSED

The General Services Administration (GSA) is updating the Products and Services Code (PSC) Manual, which provides codes to describe products, services, and research and development purchased by the government. The codes are one of the data elements reported in the Federal Procurement Data System (FPDS).

The changes to the PSC Manual will include updating the descriptions, adding or deleting codes as necessary, and adding environmental/sustainability attributes required for reporting to the Office of Management and Budget (OMB).

A draft of the PSC Manual is posted at http://blog.citizen.apps.gov/GSA_PSC_Manual/. Comments on the draft PSC Manual must be posted in the “Comments” section of http://blog.citizen.apps.gov/GSA_PSC_Manual/, between February 8, 2011 and March 9, 2011. For further information, please contact Pat Brooks at pat.brooks@gsa.gov.

OFPP REVISES EMERGENCY ACQUISITIONS GUIDE

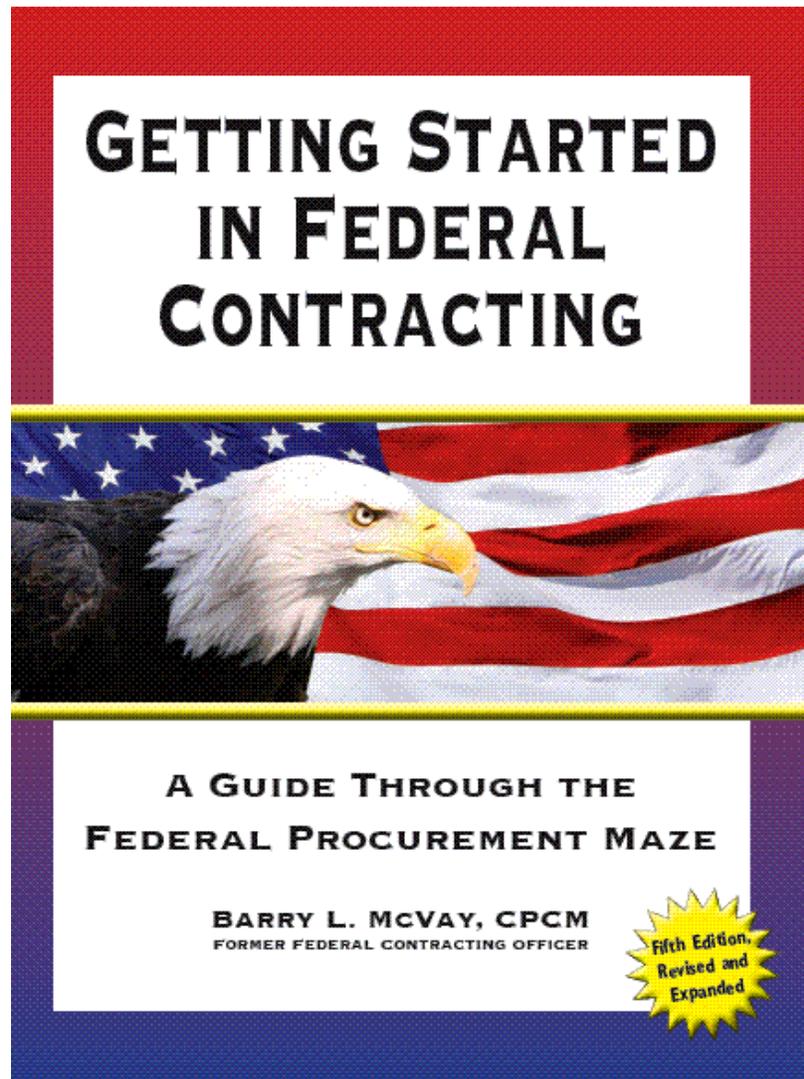
The Office of Federal Procurement Policy (OFPP) has updated its 2007 “Emergency Acquisitions” guide to bring it up to date: revised Internet addresses; to incorporate a number of management and operational best practices that agencies have developed in response to natural disasters and other emergency situations; and miscellaneous changes.

The Guide is intended to assist the federal contracting community with planning and carrying out procuring activities during contingency operations, defense or recovery from certain attacks, major disaster declarations, or other emergencies. The Guide describes strategies for effective acquisition planning and provides a list of flexibilities available when contracting during emergencies. It supplements, not supplants, agency-specific guidance, and should be read in conjunction with FAR Part 18, Emergency Acquisitions, FAR Part 26, Other Socioeconomic Programs, and the National Response Framework documents published by the Federal Emergency Management Agency (FEMA).

The Emergency Acquisitions Guide will be maintained electronically and updated, as needed, on the OFPP website <http://www.whitehouse.gov/omb/procurement/>. For more on the 2007 issuance of the “Emergency Acquisitions” guide, see the July 2007 *Federal Contracts Perspective* article “OFPP Issues Emergency Acquisitions Guide.”

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