Panoptic Enterprises'

FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

Vol. XII, No. 3 **March 2011**

SBA REVISES 8(a) PROGRAM, SMALL BUSINESS SIZE REGULATIONS

The Small Business Administration (SBA) has made the first comprehensive revision of its Section 8(a) Business Development program regulations in more than ten years. In addition, SBA revised its small business size regulations and its regulations affecting small disadvantaged businesses (SDBs). This revision reflects current practice and experience, implements statutory changes, clarifies various aspects of the regulations that have been prone to misinterpretation, and addresses situations that were not contemplated when the previous revisions to the 8(a) program were made.

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The basic rules and requirements of SBA's small business size regulations and its 8(a) program remain unchanged by this rule change; SBA proposed making changes to Title 13 of the Code of Federal Regulations, Part 121 (13 CFR Part 121), Small Business Size Regulations, and 13 CFR Part 124, 8(a) Business Development/Small Disadvantaged Business Status Determinations, to "fine tune" the regulations in the following subject areas:

13 CFR Part 121

- Exception to Affiliation for Mentor/Protégé Programs
- Joint Ventures
- Exclusion from Affiliation for Mentor/Protégé Joint Ventures
- Classification of a Procurement for Supplies
- Application of the Nonmanufacturer Rule
- Request for Formal Size Determination

13 CFR Part 124

- Completion of Program Term
- Definitional Changes
- Size for Primary North American Industry Classification System (NAICS) Code
- Economic Disadvantage
- Changes to Ownership Requirements

- Changes to Control Requirements
- Benchmarks
- Changes Applying Specifically to Tribally-Owned Firms
- Excessive Withdrawals
- Applications to the 8(a) Business Development Program
- Termination from the 8(a) Business Development Program
- Effect of Early Graduation or Termination
- Task and Delivery Order Contracts
- Barriers to Acceptance and Release From the 8(a) Business Development Program
- Competitive Threshold Amounts
- *Bona Fide* Place of Business
- Competitive Business Mix
- Administration of 8(a) Contracts
- Changes to Joint Venture Requirements
- Sole Source Limits for Native Hawaiian Organizations-Owned Concerns
- Changes to the Mentor/Protégé Program
- Reporting Requirement and Submission of Financial Statements
- Requirements Relating to Small Disadvantaged Businesses

(For more on the proposed rule, see the November 2009 ***Federal Contracts Perspective*** article "SBA Proposes Extensive Changes to 8(a) Program and Related Small Business Size Standards.")

Two hundred and thirty-one (231) respondents submitted written comments on the proposed rule. In addition, SBA held hearings in Washington, DC; New York, NY; Seattle, WA; Boston, MA; Dallas, TX; Atlanta, GA; Albuquerque, NM; Miami, FL; Chicago, IL; and Los Angeles, CA. Finally, SBA conducted tribal consultations in Seattle, WA; in Albuquerque, NM; and via teleconference in Vienna, VA with representatives in Anchorage, AK. In response to the comments, many editorial changes were made to clarify the intent of SBA. The following are some of the more significant changes made to the final rule:

■ Sections 124.2, For what length of time may a business participate in the 8(a) BD program?, 124.112, What criteria must a business meet to remain eligible to participate in the 8(a) BD program?, 124.301, What are the ways a business may leave the 8(a) BD program?, and 124.302, What is graduation and what is early graduation?, are revised to clarify that an 8(a) participant is considered to graduate only if it successfully completes the program by substantially achieving the targets, objectives, and goals contained in the concern's business plan within the nine-year program term. If it does not substantially achieve the targets, objectives, and goals in its business plan within the nine-year program term, it will be deemed to have merely "completed" its program term. The language in the proposed rule was

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

being misinterpreted as implying the SBA would extend the program term for 8(a) participants that had not achieved their targets, objectives, and goals within the nine-year program term. Instead, the final rule states that, at the end of the nine-year term, an 8(a) participant either "graduates" from the program or "completes the term.

- Section 124.4, What restrictions apply to fees for applicant and Participant representatives?, is added to provide that the compensation received by any agent or representative of an 8(a) applicant or participant for assisting the applicant in obtaining 8(a) certification or for assisting the participant in obtaining 8(a) contracts must be reasonable in light of the service(s) performed by the agent or representative. Compensation that is a percentage of the gross contract value is prohibited, and compensation that is a percentage of profits may be found to be unreasonable. The final rule sets out procedures by which SBA will suspend or revoke an agent's or representatives privilege to assist applicants.

- Proposed Section 124.102, What size business is eligible to participate in the 8(a) BD program?, stated that "SBA may graduate a participant prior to the expiration of its program term where the firm exceeds the size standard corresponding to its primary NAICS code for two successive program years." The period is changed to three successive program years in the final rule.

- Proposed Section 124.104, Who is economically disadvantaged?, would have presumed that an individual is not economically disadvantaged if his or her adjusted gross income averaged over the past two years exceeds $200,000 for initial 8(a) eligibility and $250,000 for continued 8(a) eligibility. The final rule adjusts the gross income amount to $250,000 averaged over the past three years for initial 8(a) eligibility and $350,000 for continued 8(a) eligibility. In addition, Section 124.104 would have presumed that an individual is not economically disadvantaged if the fair market value of all his or her assets (including his or her primary residence and the value of the applicant/participant firm) exceeds $3,000,000 for initial 8(a) eligibility and $4,000,000 for continued 8(a) eligibility. The final rule adjusts the fair market value to $4,000,000 for initial 8(a) eligibility and $6,000,000 for continued 8(a) eligibility.

- Proposed Section 124.106, When do disadvantaged individuals control an applicant or Participant?, would have required that the manager of the 8(a) concern "must reside in the United States, and must generally spend at least part of every month physically present in the primary offices of the applicant or participant." While the United States residency requirement is retained in the final rule, the requirement that the manager must spend part of every month physically present at the primary offices of the applicant or participant is eliminated.

- Proposed Section 124.112, What criteria must a business meet to remain eligible to participate in the 8(a) BD program?, would have defined withdrawals as excessive if during any fiscal year of the participant they exceed: (i) $200,000 for firms with sales up to $1,000,000; (ii) $250,000 for firms with sales between $1,000,000 and $2,000,000; and (iii) $400,000 for firms with sales exceeding $2,000,000. The final rule adjusts the thresholds to: (i) $250,000 for firms with sales up to $1,000,000; (ii) $300,000 for firms with sales between $1,000,000 and $2,000,000; and (iii) $400,000 for firms with sales exceeding $2,000,000.

- Proposed Section 124.504, What circumstances limit SBA's ability to accept a procurement for award as an 8(a) contract?, would have been amended to state that the SBA will not accept a procurement for award through the 8(a) program where "the procuring activity issued a solicitation for or otherwise expressed publicly a clear intent to reserve the procurement as a small business set-aside or a HUBZone or service disabled veteran-owned award prior to offering the requirement to SBA for award as an 8(a) contract." The final rule amends this to add women-owned small business (WOSB) awards to the list of small business programs that would limit SBA's ability to accept a requirement for the 8(a) program.

- Proposed Section 124.506, At what dollar threshold must an 8(a) procurement be competed among eligible participants?, would have adjusted the competitive threshold amounts from $5,000,000 to $5,500,000 for manufacturing contracts and from $3,000,000 to $3,500,000 for all other contracts to align with those in the Federal Acquisition Regulation (FAR). However, Federal Acquisition Circular (FAC) 2005-45 amended FAR 19.805-1, General, to increase the threshold for competitive 8(a) solicitations from $5,500,000 to $6,500,000 for manufacturing, and from $3,500,000 to $4,000,000 for all other acquisitions. Therefore, this final rule adjusts the thresholds accordingly. (**NOTE:** For more on the changes made by FAC 2005-45, see the September 2010 ***Federal Contracts Perspective*** article "Federal Acquisition-Related Thresholds Adjusted for Inflation.")

AFTER HIATUS, DOD RESUMES RAMPAGE THROUGH DFARS

After a one month respite from the continual overhaul of the Defense FAR Supplement (DFARS), the Department of Defense (DOD) decided pick up where it left off , issuing six final rules, two proposed rules, one request for comments, and one policy memorandum.

- **Marking of Government-Furnished Property:** This final rule adds a new clause, DFARS 252.245-7001, Tagging, Labeling, and Marking of Government-Furnished Property, to require contractors to tag, label, or mark items of government-furnished property identified in the contract when the government-furnished material and government-furnished property are subject to serialized item management [a "serially-managed item" means "an item designated by DOD to be uniquely tracked, controlled, or managed in maintenance, repair, and/or supply systems by means of its serial number"]. This clause is required in solicitations and contracts that contain FAR 52.245-1, Government Property.

In addition, paragraph (4) is added to DFARS 245.102, Policy, to provide the complete list of exceptions to the policy requiring tagging, labeling, and marking of property.

Three respondents submitted comments on the proposed rule, and the following changes are made to the final rule in response to those comments:

  – The proposed clause was to be identified as DFARS 252.211-70YY, and the list of exceptions was to be included in DFARS 211.274-5. However, FAR Part 45 addresses government property, so DFARS Part 245 is considered a more appropriate location for this rule change than DFARS Part 211, Describing Agency Needs. Therefore, DFARS 252.211-70YY becomes DFARS 252.245.7001, and DFARS 211.274-5 becomes DFARS 245.102(4).

– The list of exceptions have been removed from the proposed DFARS 252.211-70YY and included in DFARS 245.102(4). In addition, the list of exceptions has been expanded to include exceptions based on determinations by the agency.

– DFARS 252.211-70YY provided a definition for "government-furnished property." However, since a definition for "government-furnished property" in included in both FAR Part 45 and FAR 52.245-1, the definition is deleted from DFARS 252.245-7001.

– The prescription in DFARS 211.274-6, Contract Clauses, would have required that the clause be included in solicitations and contracts that contain either FAR 52.245-1 or FAR 52.245-2, Government Property Installation Operation Services. However, the use of the clause is not dependent on the presence of FAR 52.252-2, so the new clause prescription at DFARS 245.107, Contract Clauses, now refers to FAR 52.245-1 only.

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

■ **Reporting of Government Property Lost, Stolen, Damaged, or Destroyed:** This final rule amends DFARS 245.102, Policy [for Government Property], and adds an associated clause at DFARS 252.245-7002, Reporting Loss of Government Property, to require contractors to report loss, theft, damage, and destruction (LTDD) of government property to the Defense Contract Management Agency (DCMA) "eTools" application available at **http://www.dcma.mil/aboutetools.cfm**. This change facilitates DOD's migration from paper-based processes to a greater use of automation, and provide a single repository of all LTDD data to improve accountability and control of DOD assets and contractor oversight.

Three respondents submitted comments on the proposed rule. As a result of these comments, the proposed title of the clause, "Reporting Loss, Theft, Damage, or Destruction of Government Property," is changed to "Reporting Loss of Government Property" to maintain simplicity and consistency. Also, a new definition of "loss of government property" is added to the clause. For more on the proposed rule, see the May 2010 ***Federal Contracts Perspective*** article "DOD Rolls Out More Policies and Regulations."

■ **Award-Fee Contracts:** This final rule amends DFARS Subpart 216.4, Incentive Contracts, to revise guidance for award-fee evaluations and payments, eliminate the use of provisional award-fee payments, incorporate DOD policy guidance on the use of objective criteria (DFARS 216.401-71, Objective Criteria), and to revise guidance for award-fee evaluations and payments (DFARS 216.405-2, Cost-Plus-Award-Fee Contracts). Also added is new clause DFARS 252.216-7005), Award Fee, which detail the use of award fees.

Three respondents submitted comments on the proposed rule. As a result of these comments, the following changes were made to the final rule:

– In paragraph (e) of DFARS 216.401, General, is added a cross-reference to Procedures, Guidance and Information (PGI) 216.401(e) "when planning to award an award-fee contract."

– In DFARS 216.405-2(1), "held for" has been replaced by "available for" to better reflect DOD policy in the following: "The contracting officer shall perform an analysis of

appropriate fee distribution to ensure at least 40% of the award fee is *available for* the final evaluation so that the award fee is appropriately distributed over all evaluation periods to incentivize the contractor throughout performance of the contract" (emphasis added).

In addition, the following is added to DFARS 216.405-2(1): "The percentage of award fee available for the final evaluation may be set below 40% if the contracting officer determines that a lower percentage is appropriate, and this determination is approved by the head of the contracting activity (HCA). The HCA may not delegate this approval authority."

– In DFARS 216.405-2(2), "the contracting officer's final evaluation" is replaced by "the fee-determining official's final evaluation" in the following: "The final award-fee payment will be consistent with *the fee-determining official's final evaluation* of the contractor's overall performance against the cost, schedule, and performance outcomes specified in the award-fee plan" (emphasis added).

– In DFARS 252.216-7005, "contracting officer" replaces "government" in the following sentence: "The *contracting officer* may unilaterally revise the award-fee plan prior to the beginning of any rating period in order to redirect contractor emphasis" (emphasis added).

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

■ **Publication of Notification of Bundling of DOD Contracts:** This finalizes, without changes, the interim rule that added DFARS 205.205-70, Notification of Bundling of DOD Contracts, to require the publication of a notification of the intention to bundle a DOD procurement at least 30 days prior to the release of a solicitation or placing an order without a solicitation. DFARS 205.205-70 implements Section 820 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84), which states, "A contracting officer of the Department of Defense carrying out a covered acquisition shall publish a notification consistent with the requirements of paragraph (c)(2) of 10.001 of the Federal Acquisition Regulation [Policy (for market research)] on the website known as **FedBizOpps.gov** (or any successor site) at least 30 days prior to the release of a solicitation for such acquisition and, if the agency has determined that measurably substantial benefits are expected to be derived as a result of bundling such acquisition, shall include in the notification a brief description of the benefits."

No comments were submitted on the interim rule, so it is finalized without changes. For more on the interim rule, see the August 2010 ***Federal Contracts Perspective*** article "More Guidance and Regulatory Changes from DOD."

■ **Limitations on Procurements With Non-Defense Agencies:** This finalizes, without changes, the interim rule that amended DFARS Subpart 217.78, Contracts or Delivery Orders Issued by a Non-DOD Agency, to expand the limitations placed on procurements by non-DOD agencies by exempting such procurements that are: (a) entered into by a non-DOD agency that is an element of the intelligence community; and (b) when the procurement is for the performance of a joint program conducted to meet the needs of DOD and the non-DOD agency.

No comments were submitted on the interim rule, so it is finalized without changes. For more on the interim rule, see the July 2010 ***Federal Contracts Perspective*** article "A Plethora of Changes to DFARS in June."

■ **Repeal of the Small Business Competitiveness Demonstration Program:** This final rule deletes DFARS Subpart 219.10, 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"). This action mirrors the deletion of FAR Subpart 19.10 by Federal Acquisition Circular (FAC) 2005-48 (for more on FAC 2005-48, see the January 2011 ***Federal Contracts Perspective*** article "Competitiveness Demonstration Program Removed").

■ **Passive Radio Frequency Identification (RFID):** This proposed rule would revise DFARS 211.275, Radio Frequency Identification, to:

- Clarify that the RFID requirement pertains solely to "passive RFID";
- In DFARS 211.275-2, Policy, supply a link to a website in lieu of individually listing ship-to addresses (**http://www.acq.osd.mil/log/rfid/**), and enable contracting officers to add tagging requirements to contracts shipping to DOD Activity Address Codes (DODAACs) not specifically listed at the website;
- Also in DFARS 211.275-2, make pharmaceuticals subject to the Class VIII RFID tagging requirements; and
- Revise the title of DFARS 252.211-7006 to "Passive Radio Frequency Identification" (it is currently "Radio Frequency Identification"), and revise the clause to reflect these changes.

Comments on the proposed rule must be submitted no later than April 25, 2011, identified as "DFARS Case 2010-D014," 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: Meredith Murphy, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060.

■ **Rules of the Armed Services Board of Contract Appeals:** This proposed rule would amend DFARS Appendix A, Armed Services Board of Contract Appeals, Part 2, Rules, to implement statutory increases in the thresholds relating to the submission and processing of contract appeals, and to update statutory references and other administrative information.

The following are the changes being proposed:

- In the Preface, Section II(a) would be amended to update the Board's address and telephone number (Skyline Six, Room 703, 5109 Leesburg Pike, Falls Church, VA 22041-3208, telephone 703-681-8500 (receptionist), 703-681-8502 (Recorder)).

- In Rule 1, Appeals, How Taken, paragraphs (b) and (c) would be amended to increase, from $50,000 to $100,000, the threshold relating to certification, decision, and notification requirements for contractor claims.

– Rule 12.1, Elections to Utilize Small Claims (Expedited) and Accelerated Procedures, paragraph (a), and Rule 12.3, The Accelerated Procedure, paragraph (b), would be amended to increase, from $10,000 to $50,000, the threshold for applicability of small claims procedures for disposition of appeals. Also in Rule 12.1, paragraph (a), after the revised $50,000 threshold would be added the following: "or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), $150,000 or less."

– Rule 12.1, paragraph (b), would be amended to increase, from $50,000 to $100,000, the threshold for applicability of accelerated procedures for disposition of appeals.

– Rule 28, Decisions, paragraph (b) would be amended to update statutory references relating to payment of claims (31 USC 1304), and to bring it into consistency with the judgment fund certification process specified in the Treasury Financial Manual, Financial Management Service, Department of the U.S. Treasury.

Comments on the proposed rule must be submitted no later than March 14, 2011, identified as "DFARS ASBCA Rules," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) e-mail: **dfars@osd.mil**; (3) fax: 703-6818535; or (4) mail: Armed Services Board of Contract Appeals, Attn: Catherine Stanton, Skyline Six, Room 703, 5109 Leesburg Pike, Falls Church, VA 22041-3208.

■ **Efficiency Initiative Effort to Reduce Non-Value-Added Costs Imposed on Industry by DOD Acquisition Practices:** This request for comments asks the industrial base to identify DOD mandates, reporting requirements, and other acquisition practices that encourage industry to adopt processes and make investments that increase costs, especially overhead costs, but do not contribute to value added in systems and services delivered to DOD. This request is in response to the September 14, 2010, memorandum from Under Secretary of Defense (Acquisition, Technology, and Logistics) Dr. Ashton Carter, "Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending," in which he stated, "Unnecessary and low-value added processes and document requirements are a significant drag on acquisition productivity and must be aggressively identified and eliminated." (For more on the September 14, 2010, memorandum, see the October 2010 ***Federal Contracts Perspective*** article "USD(AT&L) Directs DOD to 'Do More Without More'.")

"Submissions should specifically identify policies and practices that increase industry's non-value-added costs. They should draw on a reasonable definition of 'non-value-added,' understanding that statutes and defense policies reflect persistent American values, including but not limited to, a clear focus on warfighting performance. It is not reasonable to count all costs associated with core laws governing defense acquisition as non-value-added, but data on the costs of technical and administrative decisions within the statutory framework and on particular aspects of the laws would help the Efficiency Initiative move forward. . . The supporting data should give a clear indication of the magnitude of the cost, so that DOD can evaluate and prioritize the information. Submissions should also explain how the data were collected and the relevant costs were counted or estimated. . . DOD will use these submissions as part of its internal deliberations on the Better Buying Power Initiative. We expect to seek further industry comment at a public meeting where we hope that industry experts in contract management and finance will offer comments on the topic areas raised through this request for comments,

ensuring that the results of this submission process are not idiosyncratic or overly influenced by particular companies' cost structures."

Information provided in response to this request should be submitted no later than March 31, 2011, either by e-mail to: **efficiency.ip@osd.mil**; or by mail to: Deputy Assistant Secretary of Defense for Industrial Policy, 3330 Defense Pentagon, Washington, DC 20301.

■ **Improving Contractor Past Performance Assessments:** This memorandum from Defense Procurement and Acquisition Policy Director Shay Assad forwards to the services' senior procurement executives the memorandum from the Office of Federal Procurement Policy (OFPP) Administrator Daniel Gordon "Improving Contractor Past Performance Assessments: Summary of the Office of Federal Procurement Policy's Review, and Strategies for Improvement."

"The importance of completing past performance assessments in a timely manner is crucial to the integrity of the past performance system," writes Assad. "Contracting officers and source selection information on contractors' performance when determining responsibility and deciding to award new contracts. The quality of the reports is also important in providing useful and meaningful information to source selection officials. To improve the collection of useful and timely contractor past performance information, past performance reporting guidance and controls must be improved. . .

"According to the OFPP review, it was found that DOD had 53% of reports with sufficient narrative for quality of product/service, 51% of reports with sufficient narrative for schedule control, 22% of reports with sufficient narrative for cost control, 50% of reports with sufficient narrative for business relations, and DOD has conducted past performance evaluations on approximately 50% of eligible awards. Significant improvement must be made in all areas of reporting. We will follow up on your plans to improve compliance with performance assessments."

SBA REVISES SMALL BUSINESS STATUS PROTEST REGULATIONS

The Small Business Administration (SBA) is amending its regulations to clarify the effect, across all small business programs (that is, small business, small disadvantaged business, HUBZone, and service-disabled veteran owned small business programs), of initial and appeal eligibility decisions on the procurement; increase the amount of time SBA has to render formal size determinations (15 business days); require that SBA's Office of Hearings and Appeals (OHA) issue a size appeal decision within 60 calendar days of the close of the record, if possible; increase the amount of time SBA has to file North American Industry Classification System (NAICS) code appeals; alter the NAICS code appeal procedures to comply with a Federal Court decision; clarify that contracting officers must reflect final agency eligibility decisions in federal procurement databases and goaling statistics; clarify how a contracting officer assigns a NAICS code and size standard to a multiple award procurement; and make other changes to size status protest and appeal rules.

GOVERNMENT AWARDS $537 BILLION IN FY10

The federal government spent slightly less money on contracts in Fiscal Year (FY) 2010 than it did in the previous year – $537 billion vs. $541 billion in FY 2009, a -0.7% reduction. This can be attributed largely to the fact that the wars in Iraq and Afghanistan were winding down, and that much of the Recovery Act funds had already been dispersed.

The following are the largest agencies' FY 2010 spending totals:

Defense	$366,941,507,748
Energy	$25,689,948,648
Health and Human Services	$19,033,719,304
General Services Administration	$17,655,768,989
Veterans Affairs	$16,129,042,652
National Aeronautics And Space Administration	$16,029,010,610
Homeland Security	$13,560,278,880
State	$8,120,812,544
Agency For International Development	$6,639,466,955
Justice	$6,468,503,313
Interior	$6,106,149,232
Agriculture	$6,062,683,159
Treasury	$5,959,484,316
Transportation	$5,638,321,623
Commerce	$3,939,532,190
Labor	$2,233,409,557
Education	$1,835,178,394
Environmental Protection Agency	$1,657,763,354
Housing and Urban Development	$1,596,607,896
Social Security Administration	$1,366,017,428
Office Of Personnel Management	$1,230,554,321
All Other Agencies	$3,029,616,829
GRAND TOTAL	**$536,923,377,943**

OFPP ADDRESSES COMMUNICATIONS WITH INDUSTRY

Office of Federal Procurement Policy (OFPP) Administrator Daniel Gordon issued a memorandum to all chief acquisition officers, senior procurement officers, and chief information officers announcing the initiation of the "Myth-Busters Information Program" to address misconceptions regarding communications with industry during the acquisition process.

"The purposes of this memorandum are to: (1) identify common misconceptions about vendor engagement that may be unnecessarily hindering agencies' appropriate use of the existing flexibilities, and provide facts and strategies to help acquisition professionals benefit from industry's knowledge and insight; (2) direct agencies to remove unnecessary barriers to reasonable communication and develop vendor communications plans, consistent with existing law and regulation, that promote responsible and constructive exchanges; and (3) outline steps for continued engagement with agencies and industry to increase awareness and education."

The 10 "myths" this memorandum "busts" are:

1. ***Misconception*** – "We can't meet one-on-one with a potential offeror."
   Fact – Government officials can generally meet one-on-one with potential offerors as long as no vendor receives preferential treatment.

2. ***Misconception*** – "Since communication with contractors is like communication with registered lobbyists, and since contact with lobbyists must be disclosed, additional communication with contractors will involve a substantial additional disclosure burden, so we should avoid these meetings."
   Fact – Disclosure is required only in certain circumstances, such as for meetings with registered lobbyists. Many contractors do not fall into this category, and even when disclosure is required, it is normally a minimal burden that should not prevent a useful meeting from taking place.

3. ***Misconception*** – "A protest is something to be avoided at all costs - even if it means the government limits conversations with industry."
   Fact – Restricting communication won't prevent a protest, and limiting communication might actually increase the chance of a protest – in addition to depriving the government of potentially useful information.

4. ***Misconception*** – "Conducting discussions/negotiations after receipt of proposals will add too much time to the schedule."
   Fact – Whether discussions should be conducted is a key decision for contracting officers to make. Avoiding discussions solely because of schedule concerns may be counter-productive, and may cause delays and other problems during contract performance.

5. ***Misconception*** – "If the government meets with vendors, that may cause them to submit an unsolicited proposal and that will delay the procurement process."
   Fact – Submission of an unsolicited proposal should not affect the schedule. Generally, the unsolicited proposal process is separate from the process for a known agency requirement that can be acquired using competitive methods.

6. ***Misconception*** – "When the government awards a task or delivery order using the Federal Supply Schedules, debriefing the offerors isn't required so it shouldn't be done."
   Fact – Providing feedback is important, both for offerors and the government, so agencies should generally provide feedback whenever possible.

7. ***Misconception*** – "Industry days and similar events attended by multiple vendors are of low value to industry and the government because industry won't provide useful information in front of competitors, and the government doesn't release new information."
   Fact – Well-organized industry days, as well as pre-solicitation and pre-proposal conferences, are valuable opportunities for the government and for potential vendors – both prime contractors and subcontractors, many of whom are small businesses.

8. ***Misconception*** – "The program manager already talked to industry to develop the technical requirements, so the contracting officer doesn't need to do anything else before issuing the RFP."
   Fact – The technical requirements are only part of the acquisition; getting feedback on terms and conditions, pricing structure, performance metrics, evaluation criteria, and contract administration matters will improve the award and implementation process.

9. ***Misconception*** – "Giving industry only a few days to respond to an RFP is OK since the government has been talking to industry about this procurement for over a year."
   Fact – Providing only short response times may result in the government receiving fewer proposals and the ones received may not be as well-developed - which can lead to a flawed contract. This approach signals that the government isn't really interested in competition.

10. ***Misconception*** – "Getting broad participation by many different vendors is too difficult; we're better off dealing with the established companies we know."
    Fact – The government loses when we limit ourselves to the companies we already work with. Instead, we need to look for opportunities to increase competition and ensure that all vendors, including small businesses, get fair consideration.

In addition, Gordon directs each department and agency to develop a vendor communication plan "to provide better direction to the workforce and to clarify the nature and schedule of engagement opportunities for industry." Finally, Gordon states he has directed the Federal Acquisition Institute (FAI) to develop a continuous learning module that contracting officers, program managers, procurement attorneys, and others; and that OFPP will work with FAI, the Defense Acquisition University (DAU), and agency training practitioners to conduct an awareness campaign to eliminate unnecessary barriers to vendor engagement.

OFPP ISSUES GUIDE FOR ATTRACTING ACQUISITION TALENT

In another memorandum to chief acquisition officers and senior procurement officers, OFPP Administrator Gordon provides "civilian agency acquisition and human capital officials with additional information about the many special hiring authorities and strategies which are available for the acquisition profession."

An attachment to the memorandum lists the various veterans' hiring authorities, the direct hiring authority for acquisition positions, student employment authorities, Schedule A Excepted Service appointing authority for persons with disabilities, other Excepted Service appointing authorities, non-competitive hiring authority for military spouses, and reemploying annuitants into acquisition positions.

In addition, Gordon informs readers that the Office of Personnel Management (OPM) has an online Federal Hiring Flexibilities Resource Center, which includes an online tool to help determine which potential hiring flexibility is appropriate for the particular situation (**http://www.opm.gov/Strategic_Management_of_Human_Capital/fhfrc/default.asp**).

Finally, Gordon included an attachment to the memorandum with hiring strategies that improve the visibility of acquisition jobs, target specific skill sets, and reduce, wherever possible, the administrative burden on the agency and the applicant.

CONTRACT TRANSPARENCY NOT TO BE PURSUED, FOR NOW

Based on comments and information provided in response to an advance notice of proposed rulemaking that asked for assistance in determining how best to amend the FAR to enable public posting of contract actions should such posting become a requirement in the future, the FAR Council has decided **not** to amend the FAR at this time because some of the existing acquisition systems at Acquisition Central (**http://www.acquisition.gov**) provide certain information on government contracts that is readily available to the public, and most of the content of a solicitation or contract action consists either of standard FAR terms and conditions available at https://www.acquisition.gov/far/index.html, agency specific terms and conditions available from the contracting agency website, or sensitive information that may be releasable under the Freedom of Information Act (FOIA).

This transparency effort is intended to promote efficiency in government contracting through an open acquisition process and improve federal spending accountability consistent with the president's January 21, 2009, memorandum to agency heads titled "Transparency and Open Government."

For more on the advance notice of proposed rulemaking and request for information, see the June 2010 ***Federal Contracts Perspective*** article "Information on Enhancing Transparency Sought."

DEAR BROUGHT UP-TO-DATE

The Department of Energy (DOE) is updating the DOE Acquisition Regulation (DEAR) to conform to the FAR, the Federal Property Management Regulation, and the Federal Management Regulation; to remove out-of-date coverage; and to update references.

The DEAR parts being revised are:

- Part 901, Federal Acquisition Regulations System
- Part 902, Definitions of Words and Terms
- Part 903, Improper Business Practices and Personal Conflicts of Interest
- Part 904, Administrative Matters
- Part 906, Competition Requirements
- Part 907, Acquisition Planning
- Part 908, Required Sources of Supplies and Services
- Part 909, Contractor Qualifications
- Part 911, Describing Agency Needs
- Part 914, Sealed Bidding
- Part 915, Contracting by Negotiation
- Part 916, Types of Contracts
- Part 917, Special Contracting Methods
- Part 952, Solicitation Provisions and Contract Clauses

DOE received no responses to its proposed DEAR changes, so the DEAR is amended as proposed. For more on the proposed rule, see the August 2010 ***Federal Contracts Perspective*** article "DOE Proposes More Updates to DEAR."

NFS IMPLEMENTS FAR AWARD FEE REVISION

To bring the National Aeronautics and Space Administration (NASA) FAR Supplement (NFS) into compliance with the changes made to the FAR by Federal Acquisition Circular (FAC) 2005-46, NASA is issuing an interim rule revising NFS Subpart 1816.4, Incentive Contracts (for more on FAC 2005-46, see the October 2010 ***Federal Contracts Perspective*** article "FAC 2005-46 Exempts Commercial IT from BAA").

FAC 2005-46 revised FAR 16.305, Cost-Plus-Award-Fee Contracts, FAR 16.401, General [for Incentive Contracts], and FAR 16.405-2, Cost-Plus-Award-Fee Contracts, to incorporate new requirements on the use of award fee incentives as directed by Section 814 of the Fiscal Year (FY) 2007 National Defense Authorization Act (Public Law 109-364) and Section 867 of the FY 2009 National Defense Authorization Act (Public Law 110-417):

- Link award fees to acquisition objectives in the areas of cost, schedule, and technical performance;
- Clarify that the base fee may be included in a cost plus award fee type contract at the discretion of the contracting officer;
- Prescribe narrative ratings when making a percentage of award fee available;
- Prohibit the issuance of award fees for a rating period if the contractor's performance is judged to be below satisfactory;
- Conduct an analysis and consider the results of the analysis when determining whether to use an award fee type contract or not;
- Include specific content in the award fee plans; and
- Prohibit the rolling over of unearned award fees to subsequent rating periods.

These revisions in the FAR award fee guidance resulted in the need to make associated changes to the NFS award fee regulations as follows:

- Paragraph (a) of NFS 1816.405-270, CPAF [Cost-Plus-Award-Fee] Contracts, changes the official who authorizes the use of an award fee incentive from the contracting officer to the Assistant Administrator for Procurement. In addition, paragraph (b) requires contracting officers to prepare a determination and finding (D&F) in accordance with FAR 16.401(d) prior to using an award fee incentive. The D&F is to include a discussion of the other types of contracts considered, and is to indicate why an award fee incentive is the appropriate choice.

- Paragraph (a) of NFS 1816.405-274, Award Fee Evaluation Factors, is amended to add the following: "Factors shall be linked to acquisition objectives which shall be defined in terms of contract cost, schedule, and technical performance." Also, in paragraph (b), the sentence "Cost control shall be included as an evaluation factor in all CPAF contracts" is amended to "Cost control, schedule, and technical performance considerations shall be included as evaluation factors in all CPAF contracts, as applicable."

- The title of NFS 1816.405-275, Award Fee Evaluation Scoring, is changed to "Award Fee Evaluation Rating," and paragraph (a) is revised to require the utilization of adjectival ratings as opposed to numerical scores. As a result, all references to "scores" in

NFS 1816.405-274 are changed to "ratings." In addition, the numerical scoring system used in conjunction with the adjectival ratings is changed as follows:

(1) Excellent (100-91) (unchanged)
(2) Very good (90-76) (changed from 90-81)
(3) Good (75-51) (changed from 80-71)
(4) Satisfactory (50) (changed from 70-61)
(5) Unsatisfactory (less than 50) (changed from less than 60)

"No award fee shall be paid for an unsatisfactory rating" is added immediately following the "unsatisfactory" rating.

Comments on this interim rule must be submitted by April 11, 2011, identified as "RIN 2700-AD69," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) e-mail: william.roets-1@nasa.gov; or (3) mail: NASA Headquarters, Office of Procurement, Contract Management Division, Washington, DC 20546.

NFS REVISION WOULD DISCOURAGE EVM FOR FFP CONTRACTS

This proposed rule would revise NFS Subpart 1834.2, Earned Value Management System, to discourage contracting officers from requiring the use of an earned value management (EVM) system for firm-fixed-price (FFP) contracts and subcontracts of any dollar value to relieve contractors of unnecessary reporting burdens.

EVM gives agency managers an early warning of potential cost overruns and schedule delays during the execution of their programs. EVM requires agencies to integrate information about the scope of work with cost, schedule, and performance information so they may compare planned spending with actual spending, isolate the source of performance problems, and take corrective actions in a timely manner.

FAR Subpart 34.2 and Office of Management and Budget (OMB) Circular A-11, Preparation, Submission and Execution of the Budget, require agencies to measure the cost and schedule performance of major investments with development activity using EVM. These policies are implemented by NASA through NASA Procedural Requirement (NPR) 7120.5, NASA Program and Project Management Processes and Requirements, which requires program managers to perform appropriate EVM analyses of their investments, and NFS Subpart 1834.2, which requires contractors to have an EVM system for major acquisitions with development or production work, including development or production work for flight and ground support systems and components, prototypes, and institutional investments (facilities, IT infrastructure, etc.).

Under the current NASA policy, contractors executing a FFP contract meeting specified thresholds are required to have an EVM system that complies with the guidelines in American National Standards Institute/Electronic Industries Alliance (ANSI/EIA) Standard 748, Earned Value Management Systems. However, since the cost incurred by the government is fixed, the requirement for ANSI compliance for performance under FFP contracts creates an unnecessary burden on contractors that may increase their costs and those passed on to the government. Accordingly, this proposed rule would make the following changes to NFS Subpart 1834.2:

- Paragraph (a)(2) of NFS 1834.201, General, would provide an exception to the requirement for an EVM system for contractors and subcontractors performing FFP contracts ("requiring earned value management for firm-fixed-price (FFP) contracts and subcontracts of any dollar value is discouraged"). However, "a schedule management system and adequate reporting shall be required to plan and track schedule performance for development or production contracts valued at $20 million or more. In addition, for FFP contracts that are part of a program/project of $50 million or more, the contracting officer shall collaborate with the government's program/project manager to ensure the appropriate data can be obtained or generated to fulfill program management needs and comply with the agency program management requirements of NPR 7120.5."

- NFS 1834.201(a)(1)(iii) makes the application of EVM an optional, risk-based decision at the discretion of the program/project manager for cost or fixed-price incentive contracts and subcontracts valued at less than $20 million.

Comments on this proposed rule must be submitted by April 11, 2011, identified as "RIN 2700-AD29," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) e-mail: carl.c.weber@nasa.gov; or (3) mail: Carl Weber (Mail stop 5K80), NASA Headquarters, Office of Procurement, Contract Management Division, Washington, DC 20546.