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WOMEN-OWNED SMALL BUSINESS PROGRAM INSTITUTED BY FAC 2005-51

Federal Acquisition Circular (FAC) 2005-51 consists of two changes to the Federal Acquisition Regulation (FAR): the establishment of procedures for the Women-Owned Small Business (WOSB) program, and clarification of Standard Form 26, Award/Contract. FAC 2005-51 will be known primarily as the WOSB program FAC.

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■ **Women-Owned Small Business (WOSB) Program:** This interim rule adds FAR Subpart 19.15, Women-Owned Small Business Program, to implement changes to the Small Business Administration (SBA) regulations in Title 13 of the Code of Federal Regulations, Part 127, "Women-Owned Small Business Federal Contract Program" (13 CFR Part 127) (see the November 2010 ***Federal Contracts Perspective*** article "SBA Establishes Women-Owned Small Business Contracting Program"). The SBA's WOSB program and the new FAR Subpart 19.15 are intended to help federal agencies achieve the 5% statutory goal for contracting with WOSBs.

Section 811 of the Small Business Reauthorization Act of 2000 (Public Law 106-554) authorized the restriction of competition for federal contracts in certain industries to women-owned small businesses (WOSBs) and economically disadvantaged women-owned small businesses (EDWOSBs).

It took SBA seven years to propose a WOSB program, but the program would have been restricted to four industries in which SBA considered WOSBs to be underrepresented with regard to federal procurement: North American Industry Classification System (NAICS) codes 3328, Coating, Engraving, Heat Treating, and Allied Activities; 3371, Household and Institutional Furniture and Kitchen Cabinet Manufacturing; 4412, Other Motor Vehicle Dealers; and 9281, National Security and International Affairs. In addition, an agency would have had to determine that it had taken part in discrimination against women in those four industries before it could set aside an acquisition for WOSBs (see the January 2008 ***Federal Contracts Perspective*** article "SBA Proposes Set-Aside Program for Women-Owned Small Businesses").

Out of 1,720 comments on this proposed rule, 1,591 recommended that it be withdrawn because they believed women had suffered discrimination in more than those four industries, and the majority of those against the proposed rule felt that agencies were not about to declare that they had discriminated against women. So the rule was revised to increase the number of

industries covered by the WOSB program to 32, but the revised rule retained the requirement for agencies to make a determination that they had engaged in discrimination against women (see the November 2008 ***Federal Contracts Perspective*** article "Women-Owned Business Assistance Program Instituted").

SBA received 38 comments on the revised rule, and it decided to expand the number of covered industries to 83 and delete the requirement for agencies to execute discrimination determinations (see the April 2010 ***Federal Contracts Perspective*** article "SBA Reproposes Women-Owned Small Business Program"). This change received 998 comments, but almost all of them supported the changes, commended the SBA for its efforts, and urged the SBA to expeditiously promulgate final regulations since WOSBs have been waiting eleven years for the program. Based on this overwhelming support, SBA issued its final WOSB program regulations, which became effective February 4, 2011 (see the November 2010 ***Federal Contracts Perspective*** article "SBA Establishes Women-Owned Small Business Contracting Program").

The SBA WOSB regulations identified 45 industries in which WOSBs are ***underrepresented*** and for which contracting officers can set-aside acquisitions for EDWOSBs (by four-digit North American Industry Classification System (NAICS)), and 38 industries in which WOSBs are ***substantially underrepresented*** and for which contracting officers can set-aside acquisitions for WOSBs.

This interim rule adds FAR Subpart 19.15, adds two clauses – FAR 52.219-29, Notice of Total Set-Aside for Economically Disadvantaged Women-Owned Small Business (EDWOSB) Concerns, and FAR 52.219-30, Notice of Total Set-Aside for Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program – and makes assorted other changes throughout the FAR.

WOSB and EDWOSB eligibility requirements are in 13 CFR Part 127. To qualify as a WOSB concern eligible under the WOSB Program, the concern must be a small business as defined in 13 CFR Part 121 in its primary industry classification, and not less than 51% directly and unconditionally owned by, and the management and daily operations controlled by, one or more women who are citizens of the United States. To qualify as an EDWOSB concern, the concern must meet the same qualifications as WOSBs except that it must be not less than 51% directly and unconditionally owned by, and the management and daily operations controlled by, one or more women who are citizens of the United States *and are economically disadvantaged*. A woman is economically disadvantaged if she can demonstrate certain income, asset, and other limitations established in SBA regulations. An EDWOSB is automatically an eligible WOSB. (See FAR 2.101, Definitions, and FAR 19.1503, Status.)

NOTE: To qualify as economically disadvantaged, 13 CFR Section 127.203, What are the rules governing the requirement that economically disadvantaged women must own EDWOSBs?, states, "a woman is economically disadvantaged if she can demonstrate that her ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business. SBA does not take into consideration community property laws when determining economic disadvantage

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when the woman has no direct, individual or separate ownership interest in the property…In order to be considered economically disadvantaged, the woman's personal net worth must be less than $750,000, excluding her ownership interest in the concern and her equity interest in her primary personal residence…The personal financial condition of the woman claiming economic disadvantage, including her personal income for the past three years (including bonuses, and the value of company stock given in lieu of cash), her personal net worth and the fair market value of all of her assets, whether encumbered or not, will be considered in determining whether she is economically disadvantaged…SBA may consider a spouse's financial situation in determining a woman's access to credit and capital…When considering a woman's personal income, if the adjusted gross yearly income averaged over the three years preceding the certification exceeds $350,000, SBA will presume that she is not economically disadvantaged."

Contracting officers may restrict competition to EDWOSBs in those 45 industries where SBA has determined that WOSB concerns are underrepresented, and may restrict competition to WOSBs or EDWOSBs in those 38 industries where WOSB concerns are substantially underrepresented (FAR 19.1505, Set-Aside Procedures). A list of the 83 industries is at **http://www.sba.gov/sites/default/files/files/gc_wosb_naics_grids.pdf**.

To set aside an acquisition for WOSBs or EDWOSBs, the contracting officer must expect that two or more WOSBs or EDWOSBs will submit offers, the contract award will be made at a fair and reasonable price, and the anticipated award price of the contract (including options) will not exceed $6,500,000 for a contract for manufacturing, or $4,000,000 for all other contracts.

Finally, new FAR 19.308, Protesting a Firm's Status as an Economically Disadvantaged Women-Owned Small Business (EDWOSB) Concern or Women-Owned Small Business (WOSB) Concern Eligible Under the WOSB Program, provides a protest process and procedures for interested parties to challenge the size and status of a WOSB or EDWOSB. A protest of the size and status does not preclude the contracting officer from awarding the contract – FAR 19.308(g) allows the contracting officer to award a contract after receipt of a protest if the contracting officer determines there is an immediate need or significant harm would result in the event the award is not made.

Comments on this interim rule must be submitted no later than May 31, 2011, identified as "FAC 2005-51, FAR Case 2010-015," 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.

■ **Clarification of Standard Form 26, Award/Contract:** This final rule revises Standard Form (SF) 26, Award/Contract, to clarify that Block 18, Award, is to be used only in sealed bidding procurements.

Sealed bidding awards are usually made when a contracting officer unilaterally signs an SF 33, Solicitation, Offer, and Award, thus accepting the bid and forming a binding contract. However, paragraph (d)(1) of FAR 14.408-1, General [sealed bidding awards], states, "If an offer from a SF 33 leads to further changes, the resulting contract shall be prepared as a bilateral document on SF 26, Award/Contract."

Because the SF 26 can be used to make awards under negotiation procedures, there were two check boxes: Block 17, Contractor's Negotiated Agreement, and Block 18, Award. Agencies have identified instances in which contracting officers mistakenly checked Block 18 when awarding negotiated, not sealed bid, contracts, which created the potential for disputes between

the agency and contractors. Block 18 stated, "Your offer on Solicitation Number _____, including the additions or changes made by you which additions or changes are set forth in full above, is hereby accepted as to the terms listed above and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the government's solicitation and your offer, and (b) this award/contract. No further contractual document is necessary." When Block 18 was mistakenly checked for a negotiated award, it gave the impression that the contracting officer was accepting the offer in its entirety, which may not be the case. Therefore, Block 18 has been revised to eliminate this confusion. Block 18 is now identified as "Sealed-Bid Award," and the following parenthetical has been added at the end of the instructions in the block: "Block 18 should be checked only when awarding a sealed-bid contract.")

No respondents submitted comments on the proposed rule, so it is finalized without changes. For more on the proposed rule, see the October 2010 ***Federal Contracts Perspective*** article "FAR Rule Would Address T&M/Labor-Hour Contracts."

ORGANIZATIONAL CONFLICTS OF INTEREST CHANGES PROPOSED

A proposed rule would amend FAR Subpart 9.5, Organizational and Consultant Conflicts of Interest, to provide revised regulatory coverage on organizational conflicts of interest (OCIs), provide additional coverage regarding contractor access to nonpublic information, and add related provisions and clauses.

FAR Subpart 9.5 is intended designed to help the government in identifying and addressing circumstances in which (1) a government contractor may be unable to render impartial assistance or advice to the government, or (2) might have an unfair competitive advantage based on unequal access to information or prior involvement in setting the ground rules for an acquisition. Paragraph (a) of FAR 9.504, Contracting Officer Responsibilities, directs contracting officers to "identify and evaluate potential OCIs as early in the acquisition process as possible" and "avoid, neutralize, or mitigate significant potential conflicts before contract award." FAR Subpart 9.5 has remained largely unchanged since the initial publication of the FAR in 1984. The FAR coverage was adapted from an appendix to the Defense Acquisition Regulation, which dated back to the 1960s.

Recent trends in acquisition and industry have led to the increased potential for OCIs, including industry consolidation; agencies' growing reliance on contractors for services, especially where the contractor is tasked with providing advice to the government; and the use of multiple-award task- and delivery-order contracts, which permit large amounts of work to be awarded among a limited pool of contractors.

In April 2010, the Department of Defense (DOD) published a proposed rule to amend the Defense FAR Supplement (DFARS) to address OCIs in major defense acquisition programs (see the May 2010 ***Federal Contracts Perspective*** article "DOD Rolls Out More Policies and Regulations"). The proposed rule implements Section 207 of the Weapons System Acquisition Reform Act of 2009 (Public Law 111-23), which sets out situations that must be addressed and allows DOD to establish such limited exceptions as are necessary to ensure that DOD has continued access to advice on systems architecture and systems engineering matters from highly qualified contractors, while ensuring that such advice comes from sources that are objective and unbiased.

The FAR proposed OCI rule is substantially the same as the DFARS proposed OCI rule in some respects, and substantially different in others.

Both this proposed FAR rule and the proposed DFARS rule:

- Reorganize and move OCI coverage from FAR Part 9, Contractor Qualifications, to FAR Part 3, Business Ethics and Conflicts of Interest (currently titled "Improper Business Practices and Personal Conflicts of Interest"), so OCIs are addressed along with other business practices and personal conflicts of interest;
- Clarify key terms and provide more detailed guidance regarding how contracting officers should identify and address OCIs while emphasizing that each OCI case may be unique and must be approached with thoughtful consideration;
- Provide standard OCI clauses, coupled with the opportunity for contracting officers to tailor the clauses as appropriate for particular circumstances; and
- Address unique policy issues and contracting officer responsibilities associated with OCIs arising in the context of task- and delivery-order contracts.

However, this proposed FAR rule differs from the proposed DFARS rule by:

- Providing an analysis of the risks posed by OCIs, and the harm to the integrity of the competitive acquisition system and government's business interests;
- Recognizing that harm to the integrity of the competitive acquisition system affects not only the government, but also other vendors, in addition to damaging the public trust in the acquisition system;
- Moving coverage of unequal access to nonpublic information and the requirement for resolving any resulting unfair competitive advantage out of the domain of OCIs and treating it separately in FAR Subpart 4.4, Safeguarding Classified Information Within Industry; and
- Adding broad coverage regarding contractor access to nonpublic information, to provide a more detailed framework in which to address the topic of unequal access to nonpublic information.

Respondents on the proposed rule are encouraged to provide their views on the following:

- Do the policy and associated principles in the proposed rule provide an effective framework for evaluating and addressing conflicts of interest?
- Is the definition of "organizational conflict of interest" in FAR 2.101, Definitions, sufficiently comprehensive to address all potential forms of such conflicts?
- Do the enumerated techniques for addressing OCIs adequately address the government's interests? Are any too weak or overbroad? Are there other techniques that should be addressed?
- Does the rule adequately address the potential conflicts that may arise for companies that have both advisory and production capabilities? What, if any, improvements might be made?
- Do the proposed solicitation provisions and contract clauses adequately implement the policy framework set forth in the proposed rule? For example, is a clause limiting future contracting an operationally feasible means of resolving a conflict? Would it be beneficial and appropriate for this information generally to be made publicly available, such as through a notice on FedBizOpps (**https://www.fbo.gov**)? Do the solicitation provisions and contract

clauses afford sufficient flexibility to help an agency meet its individual needs regarding a prospective or actual conflict?

- Is there a need for additional guidance to supplement the proposed FAR coverage of OCIs (for example, guidance addressing the management of OCI responsibilities)? If so, what points should the guidance make?
- Is the framework presented by this proposed rule preferable to the framework presented in the DFARS proposed rule? Why or why not? Would some hybrid of the two proposed rules be preferable?
- Does the proposed rule strike the right balance between providing detailed guidance for contracting officers and allowing appropriate flexibility for dealing with the variety of forms that organizational conflicts of interest take and the variety of circumstances under which they arise?
- Are there certain types of contracts, or contracts for certain types of services, that warrant coverage that is more strict than that provided by the proposed rule?

Comments on this proposed rule must be submitted no later than June 27, 2011, identified as "FAR Case 2011-001," 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.

PROPOSALS ON SERVICE CONTRACT, PROPERTY REPORTING

Besides the proposed FAR rule on organizational conflicts-of-interest (see preceding article), two other proposed FAR rules addressing service contract reporting and government property reporting, reutilization, and disposal were issued for comment.

- **Service Contracts Reporting Requirements:** This proposed rule would add FAR Subpart 4.16, Service Contracts Inventory, to implement Section 743 of Division C of the Consolidated Appropriations Act, 2010 (Public Law 111-117), which requires service contractors for federal agencies covered by the Federal Activities Inventory Reform (FAIR) Act of 1998, except the Department of Defense (DOD), to submit information annually in support of agency-level inventories for service contracts.

FAR Subpart 4.16 would address the responsibilities for collection, management, and reporting of this information, and new FAR 52.204-XX, Service Contract Reporting Requirements, would incorporate into covered solicitations and contracts the requirements for contractors to collect and report this information. An alternate clause would be used for orders placed on indefinite-delivery contracts.

Section 743 requires that the agency-level inventory report must include the following information for each covered service contract:

- A description of the services purchased by the executive agency and the role the services played in achieving objectives, regardless of whether such a purchase was made through a contract or task order;
- The organizational component of the executive agency administering the contract, and the organizational component of the agency whose requirements are being met through contractor performance of the service;

- The total dollar amount obligated for services under the contract and the funding source for the contract;
- The total dollar amount invoiced for services under the contract;
- The contract type and date of award;
- The name of the contractor and place of performance;
- The number and work location of contractor and subcontractor employees, expressed as full-time equivalents for direct labor, compensated under the contract;
- Whether the contract is a personal services contract; and
- Whether the contract was awarded on a noncompetitive basis, regardless of date of award.

While much of this information will be reported by the contracting officer in the Federal Procurement Data System – Next Generation (FPDS-NG, **https://www.fpds.gov**), the contractor will be required to provide information about the total amount invoiced for services and number of direct labor hours expended on services performed during the previous government fiscal year, and this information will be used to calculate the number of contractor manpower full-time equivalents. Proposed FAR 52.204-XX, Service Contract Reporting Requirements, identifies the information the contractor must provide by October 31 each year on its contract and its covered subcontracts:

- Contract number and, as applicable, task order number.
- The total dollar amount invoiced for services performed during the previous fiscal year under the contract.
- The number of contractor direct labor hours expended on the services performed during the previous fiscal year.
- Data reported by covered first-tier subcontractors:
  - Subcontractor DUNS number, or if DUNS number is unavailable, subcontractor name.
  - The number of first-tier subcontractor direct-labor hours expended on the services performed during the previous government fiscal year.

Proposed FAR 4.1603, Contractor Reporting Requirements, requires contractors to report the following:

- All cost-reimbursement, time-and-materials, and labor-hour service contracts and first-tier subcontracts awarded or orders issued with an estimated total value above the simplified acquisition threshold (currently $150,000).
- All fixed-price contracts and subcontracts or orders according to the following thresholds:
  - Awarded or issued in Fiscal Year 2011 with an estimated total value of $5,000,000 or greater.
  - Awarded or issued in FY 2012, with an estimated total value of $2,500,000 or greater.
  - Awarded or issued in FY 2013, with an estimated total value of $1,000,000 or greater.
  - Awarded or issued in FY 2014 and subsequent years, with an estimated total value of $500,000 or greater.

All this information will be compiled by each agency, and posted on its website and published in the ***Federal Register*** by January 30.

Comments on this proposed rule must be submitted no later than June 20, 2011, identified as "FAR Case 2010-010," 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.

■ **Government Property:** This proposed rule would amend FAR Part 45, Government Property, to clarify current reporting, reutilization, and disposal of government property and the contractor requirements under FAR 52.245-1, Government Property. In addition, a number of other changes are being proposed to enhance the management of government contract property in the hands of contractors. The changes are the product of questions raised by contractors and government personnel, government and industry exchanges, and lessons learned. Also, some comments from the earlier FAR government property rule (see the August 2010 ***Federal Contracts Perspective*** article "Trade Agreements Thresholds Increased") that were considered outside the scope of that rule are addressed in this proposed rule (for more on the earlier FAR rule on government property, see the August 2010 ***Federal Contracts Perspective*** article "Trade Agreements Thresholds Increased").

The proposed rule revisions include the following:

- FAR 45.000, Scope of Part, would clarify that FAR Part 45 and FAR 52.245-1 do not apply to government property that is incidental to the place of performance at a government site or installation ("items considered to be incidental to the place of performance include, for example, office space, desks, chairs, telephones, computers, and fax machines").
- New definitions for "loss of government property" and "unit acquisition cost" would be added to FAR 45.101, Definitions, and FAR 52.245-1; the definition of "surplus property" would be moved from FAR 45.101 to FAR 2.101; and the definition of "acquisition cost" would be deleted from FAR 45.101.
- FAR Subpart 45.6, Reporting, Reutilization, and Disposal, would be clarified and aligned with the Federal Management Regulation (FMR), which provides property management guidance to government personnel.

Comments on this proposed rule must be submitted no later than June 3, 2011, identified as "FAR Case 2010-009," 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.

THE AVALANCHE OF DFARS CHANGES KEEPS PILING UP

On top of the 21 separate documents addressing Department of Defense (DOD) contracting issued in March, DOD piled up an additional three final rules, one interim rules, four proposed rules, two class deviations, and six policy memoranda!

■ **Acquisition of Commercial Items:** This finalizes, without changes, the interim rule that implemented Sections 805 and 815 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181). Section 805 specifies the conditions under which a time-and-materials (T&M) or labor-hour (LH) contract may be used for the acquisition of commercial items. Section 815 addresses the situations under which major weapon systems, subsystems of major weapon systems, and components and spare parts for major weapon systems may be acquired using procedures established for the acquisition of commercial items.

The following changes were made by the interim rule:

– DFARS 212.207, Contract Type, was added. It specifies that T&M and LH contracts may be used to acquire commercial items on for the following: (1) services acquired in support of a commercial item; (2) emergency repair services; and (3) any other commercial services if the head of the agency approves a determination of the contracting officer that such services are commonly sold to the general public through use of T&M or LH contracts, and the use of a T&M or LH contract type is in the best interest of the government.

– DFARS 234.7002, Policy, was amended to clarify that: (1) a subsystem of a major system may be treated as a commercial item if the subsystem is intended for a major system that is being acquired as a commercial item, or the contracting officer determines the subsystem is a commercial item; and (2) a component or spare part for a major weapon system or a subsystem of a major weapon system (other than a commercially available off-the-shelf item) may be treated as a commercial item if the component or spare part is intended for a major system or a subsystem that is being acquired as a commercial item.

Three respondents submitted comments on the interim rule, but DOD decided not to adopt any of the changes, so the interim rule is adopted without changes. For more on the interim rule, see the August 2009 ***Federal Contracts Perspective*** article "Tidal Wave of DFARS Changes in July."

■ **Ownership or Control by a Foreign Government:** This adopts as final, without changes, the interim rule that implemented revisions to DOD Directive-Type Memorandum (DTM) 09-019, "Policy Guidance for Foreign Ownership, Control, or Influence (FOCI)." These revisions modified the description of communications security material that is "proscribed information," so paragraph (g)(ii)(B) of DFARS 209.104-1, General Standards, was revised to reflect that the responsible office is the Security Directorate, Office of the Deputy Under Secretary of Defense, Human Intelligence, Counterintelligence, and Security. In addition, paragraph (a)(4)(ii) of DFARS 252.209-7002, Disclosure of Ownership or Control by a Foreign Government, was revised to reflect changes to the description of communication security material that is "proscribed information": "Communications security (COMSEC) material, excluding controlled cryptographic items when unkeyed or utilized with unclassified keys."

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

■ **Definition of Multiple-Award Contract:** This final rule amends the definition of "multiple-award contract" at DFARS 207.107-2, Definitions [for consolidation of contract requirements], to correct imprecise language.

Paragraph (1) of the "multiple-award contract" definition is amended as follows:

- "Orders placed using" is removed from "Orders placed using a multiple-award schedule contract" because the multiple-award contract is the basic schedule contract, and not the individual orders placed under it; and
- "or Department of Veterans Affairs" is added to reflect the agencies that have statutory authority to issue schedule contracts.

Paragraph (1) now defines a multiple-award contract as: "(1) A multiple-award schedule contract issued by the General Services Administration or Department of Veterans Affairs as described in FAR Subpart 8.4 [Federal Supply Schedules]…"

■ **Accelerate Small Business Payments:** This interim rule accelerates payments to all small business concerns, not just small disadvantaged businesses, by removing the word "disadvantaged" from "small disadvantaged business concerns" in DFARS 232.903, Responsibilities, and paragraph (a)(ii) of DFARS 232.906, Making Payments.

Comments on this interim rule must be submitted no later than June 27, 2011, identified as "DFARS Case 2011-D008," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) e-mail: **dfars@osd.mil**; (3) fax: 703-602-0350; or (3) mail: Defense Acquisition Regulations System, Attn: Lee Renna, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

In conjunction with this interim rule, Shay Assad, Director of Defense Procurement Acquisition Policy, issued a class deviation directing the immediate implementation of DFARS 232.903 and DFARS 232.906. "All DOD entitlement and payment systems need to be modified to accommodate this policy change. As a result, accelerating payments to small businesses will be accomplished in a phased approach as these systems are modified. In the initial phase, the Defense Finance and Accounting Service (DFAS) will modify DOD's largest payment system, the Mechanization of Contract Administration Services [MOCAS] system. Subsequent phases will consist of a system-by-system initiation of accelerated payments as DFARS and the other DOD components update their respective systems to accommodate the accelerated payment procedures."

■ **Alternative Line-Item Structure:** This proposed rule would add paragraph (g) to DFARS 204.7103-1, Criteria for Establishing [contract line items], and DFARS 252.204-70XX, Alternative Line-Item Structure, to provide offerors the opportunity to propose an alternative line-item structure that reflects the offeror's business practices for selling and billing commercial items and initial provisioning spares for weapon systems.

The level of detail in the requirements description and line-item structure is not always sufficient for delivery, payment, and subsequent inventory management of the items delivered.

For example, the contract line item may be for a desktop computer, but the actual items delivered, invoiced, and inventoried may reflect a separate monitor, keyboard, and central processing unit. The resultant misalignment of transaction detail causes failures in DOD's electronic processes that require manual intervention with potential delays in contractor payment. To address this recurring problem, this proposed rule would establish and standardize a process to enable offerors to propose changes in their offer to the solicitation's line-item structure.

The proposed rule would make the following changes:

- Paragraph (g) would be added to DFARS 204.7103-1, Criteria for Establishing. It would state, "Certain commercial items and initial provisioning spares for weapons systems are requested and subsequently solicited using units of measure such as kit, set, or lot. However, there are times when individual items within that kit, set, or lot are not grouped and delivered in a single shipment. This creates potential contract administration issues with inspection, acceptance, and payment. In such cases, solicitations should be structured to allow offerors to provide information about products that may not have been known to the Government prior to solicitation and propose an alternate line-item structure as long as the alternate is consistent with the requirements of DFARS 204.71 [Uniform Contract Line Item Numbering System], which provides explicit guidance on the use of contract line items and subline items, and PGI [Procedures, Guidance, and Information] 204.71."

- DFARS 252.204-70XX would be required to be used in solicitations for commercial items and initial provisioning spares. The provision would invite offerors to "propose an alternative line item structure for items on which bids, proposals, or quotes are requested in this solicitation to ensure that the resulting contract structure is economically and administratively advantageous to the government and the contractor."

Comments on this proposed rule must be submitted no later than June 20, 2011, identified as "DFARS Case 2010-D017," 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 (3) mail: Defense Acquisition Regulations System, Attn: Julian Thrash, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Ships Bunkers Easy Acquisition (SEA) Card® and Aircraft Ground Services:** This proposed rule would revise DFARS 213.306, SF 44, Purchase Order-Invoice-Voucher, allow the use of U.S. government fuel cards in lieu of a Standard Form (SF) 44, Purchase Order-Invoice-Voucher for fuel, oil, and refueling-related items for purchases not exceeding the simplified acquisition threshold.

The military services and the U.S. Coast Guard have small vessels that must procure fuel away from their home stations. Due to their smaller size and unique mission requirements, these vessels are unable to use the Defense Energy Support Center (DESC) bunkers contracts at major seaports. Currently, DFARS 213.306(a)(1)(A) authorizes only the use of the Aviation Into-plane Reimbursement (AIR) Card® up to the simplified acquisition threshold specifically for aviation fuel and oil. Refueling stops often include other ground refueling-related services that exceed the micro-purchase threshold. Due to port restrictions on vessel movements, bunkering merchants do not typically provide support to smaller vessels. Therefore, this proposed rule would amend

DFARS 213.306(a)(1)(A) so that it reads as follows: "*Fuel and oil*. U.S. government fuel cards may be used in lieu of an SF 44 for fuel, oil, and authorized refueling-related items (see PGI 213.306 for procedures on use of fuel cards)."

Comments on this proposed rule must be submitted no later than June 20, 2011, identified as "DFARS Case 2009-D019," 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 (3) mail: Defense Acquisition Regulations System, Attn: Dustin Pitsch, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Construction and Architect-Engineer Services Performance Evaluation:** This proposed rule would remove the requirement to use DOD-unique forms to prepare contractor performance evaluations for construction and architect-engineer (A-E) services. Past performance data for construction and A-E services has been collected on specific standard forms – the SF 1420, Performance Evaluation – Construction Contracts, and the SF 1421, Performance Evaluation (Architect-Engineer). However, DOD has collected the data on DD Form 2626, Performance Evaluation (Construction), and DD Form 2631, Performance Evaluation (Architect-Engineer), in lieu of the standard forms.

FAC 2005-34 removed SF 1420 and SF 1421 and the procedures that accompanied them from the FAR, and emphasized the use of the Past Performance Information Retrieval System (PPIRS) (**http://www.ppirs.gov/**). Therefore, to comply with this direction, DOD had decided to remove DD Form 2626 and DD Form 2631 from DFARS Part 253, Solicitation Provisions and Contract Clauses.

Comments on this proposed rule must be submitted no later than June 20, 2011, identified as "DFARS Case 2010-D024," 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 (3) mail: Defense Acquisition Regulations System, Attn: Manuel Quinones, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

For more information on FAC 2005-34, see the August 2009 ***Federal Contracts Perspective*** article "FAC 2005-34 Addresses Past Performance Information."

■ **Responsibility and Liability for Government Property:** This proposed rule would add DFARS 245.104, Responsibility and Liability for Government Property, to extend the government's self-insurance policy for loss of government property to negotiated fixed-price contracts awarded on a basis other than submission of certified cost or pricing data.

FAR 45.104 provides that contractors are not held liable for loss of government property occurring under the following types of contracts: cost-reimbursement, time-and-materials, labor-hour, and fixed-price contracts awarded on the basis of submission of certified cost or pricing data.

DOD believes that that the government should be self-insuring under contracts that provide government property. Therefore, this proposed rule would add DFARS 245.104(a), which would state, "In addition to the contract types listed at FAR 45.104, contractors are not held liable for loss of government property under negotiated fixed-price contracts awarded on a basis other than submission of certified cost or pricing data." In addition, paragraph (c) of DFARS 245.107, Contract Clauses, which requires the use of DFARS 252.245-7002, Reporting Loss of Government Property, in solicitations and contracts that contain FAR 52.245–1, Government Property, would be revised to eliminate the use of Alternate I of FAR 52.245-1 since it requires

contractors to assume the risk and be responsible for loss of government property ("For negotiated fixed-price contracts awarded on a basis other than submission of certified cost or pricing data for which government property is provided, use the clause at FAR 52.245-1, Government Property, without its Alternate I").

Comments on this proposed rule must be submitted no later than June 20, 2011, identified as "DFARS Case 2010-D018," 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 (3) mail: Defense Acquisition Regulations System, Attn: Jennifer Abi-Najm, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Class Deviation on Contractor Personnel Performing in the United States Central Command (USCENTCOM) Area of Responsibility:** This class deviation requires the use of DFARS 252.225-7995, Contractor Personnel Performing in the United States Central Command Area Of Responsibility (Deviation 2011-O0004), in place of FAR 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States, to account for contractor personnel and certain equipment in the USCENTCOM area of responsibility.

DFARS 252.225-7995 is to be used in all contracts that require performance in the USCENTCOM area of responsibility not already covered by DFARS 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States. The clause requires the use of the Synchronized Predeployment and Operational Tracker (SPOT) for all personnel and equipment use in performing private security functions and all other contractor personnel except personnel hired under contracts valued at less than $100,000 and personnel in the USCENTCOM area or responsibility for fewer than 30 continuous days.

■ **Savings Related to "Should Cost":** This joint memorandum from Ashton B. Carter, Under Secretary of Defense (Acquisition, Technology and Logistics), and Robert F. Hale, Under Secretary of Defense (Comptroller/Chief Financial Officer) establishes the following policy with regard to achieved savings produced by successful "should cost" program execution:

> "At some point, Service Acquisition Executives will declare that program should-cost savings have been achieved (for example, the negotiated price of an annual production lot of a system is equal to or better than a should-cost program target)…Savings would then generally be retained by the service and reallocated to the highest priority needs as determined by the service secretary or a senior leader designated by the service secretary.
>
> "An exception to the aforementioned guidance would apply if the secretary of defense or appropriate designee determines that the savings are required to meet high-priority department-wide needs, such as financial requirements generated by Joint Urgent Operational Needs. In that case, the savings would be diverted to these departmental requirements."

■ **Implementation of Will-Cost and Should-Cost Management:** This memorandum to acquisition and logistics personnel from Ashton B. Carter, Under Secretary of Defense (Acquisition, Technology and Logistics), supplements his memorandum "Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending" by providing additional direction on the implementation of Will-Cost and Should-Cost Management. His

"Better Buying Power" memorandum directed acquisition professionals to "drive productivity growth through Will Cost/Should Cost management" (see the October 2010 ***Federal Contracts Perspective*** article "USD(AT&L) Directs DOD to 'Do More Without More'").

"Program managers will develop, own, track, and report against Should-Cost estimates…Service and Component Acquisition Executives should develop incentive plans for their program managers to reinforce and reward commitment to the Will-Cost and Should-Cost Management process."

Included with the memorandum are two attachments: Ingredients of Should-Cost Management, and Will-Cost and Should-Cost Management Example Programs.

■ **Role of the Defense Contract Management Agency (DCMA):** This memorandum from Shay Assad, Director of Defense Procurement Acquisition Policy, reminds the DOD services' procurement officials that "DCMA was established to perform contract administration for the Department of Defense," and that the services should not be performing contract administration on their contracts because it is a duplication of costs "that we cannot afford…If issues arise with DCMA performance, those concerns should be communicated up the DCMA chain of command for review."

■ **Quality Reviews of Contract, Grant, and Cooperative Agreement Recipient Reports Required by the American Reinvestment and Recovery Act:** This memorandum from Shay Assad, Director of Defense Procurement Acquisition Policy, forwards "DOD Quality Assurance Process for Reviewing Recipient Reports – American Recovery and Re-Investment Act of 2009," which contains guidance and procedures for reviewing contracts, grants, and cooperative agreements awarded under the American Reinvestment and Recovery Act (Public Law 111-5). Section 1512 of the Recovery Act requires recipients of awards funded by the act to report quarterly on the use of those funds. Agencies are required to review recipient reports to facilitate and improve the quality of the data submissions.

■ **Amplifying Guidance on Improving Competition in Defense Procurements:** This memorandum from Shay Assad, Director of Defense Procurement Acquisition Policy, issues policy guidance intended to maximize competition in situations where only one offer is received in a procurement utilizing competitive procedures.

For competitive acquisitions above the simplified acquisition threshold ($150,000), including commercial items and construction, the following procedures apply:

- If the solicitation was advertised for fewer than 30 days and only one offer is received, the contracting officer shall cancel and resolicit for an additional period of at least 30 days.

- If a solicitation allowed at least 30 days for receipt of offers and only one offer was received, then the contracting officer shall *not* depend on the standard in paragraph (c)(ii) of FAR 15.403-1, Prohibition on Obtaining Certified Cost or Pricing Data (10 U.S.C. 2306a and 41 U.S.C. 254b), in determining the price to be fair and reasonable (*i.e.,* "there was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors, competing independently, would submit priced offers in response to the solicitation's expressed requirement, even though only one offer is

> received from a responsible offeror and if: (A) based on the offer received, the contracting officer can reasonably conclude that the offer was submitted with the expectation of competition, *e.g.,* circumstances indicate that: (*1*) the offeror believed that at least one other offeror was capable of submitting a meaningful offer; and (*2*) the offeror had no reason to believe that other potential offerors did not intend to submit an offer; and (B) the determination that the proposed price is based on adequate price competition, is reasonable, and is approved at a level above the contracting officer…"). Instead, the contracting officer shall use price or cost analysis in accordance with FAR 15.404-1, Proposal Analysis Techniques, to make that determination. If the contracting officer believes it is necessary to enter into negotiations with an offeror, the basis for the negotiations shall be either certified cost or pricing data or data other than certified cost or pricing data, as appropriate. The negotiated price should not exceed the offered price.

Exceptions to this policy are procurements in support of emergency acquisitions for contingency operations, humanitarian assistance, disaster relief, peacekeeping operations, or recovery from nuclear, biological, chemical, or radiological attacks against the United States. In addition, waivers to this policy may be granted by the head of the contracting activity (HCA). The HCA may delegate this authority to not lower than one level above the contracting officer.

■ **Cash Flow Tool for Evaluating Alternative Financing Arrangements:** This memorandum from Shay Assad, Director of Defense Procurement Acquisition Policy, announces a new analysis tool that allows the contracting officer and industry to compare the financial cost and benefits of using performance-based payments (PBPs) versus customary progress payments.

"PBPs offer the contractor improved cash flow as compared to customary progress payments. Because of the differing view of the time-value of money between industry and the government, PBPs provide a unique opportunity for a win-win financial arrangement…[However,] PBPs are not practical for all fixed price contracts and require considerable effort between the contractor and government to identify the appropriate PBP events and establish the proper completion criteria for those events. Therefore, the contractor should be instructed that if PBPs are desired, a proposed PBP schedule should be submitted which includes all PBP events, completion criteria and event values along with the contractor's expected expenditure profile. This will allow the government and contractor to determine the practicality of PBPs for that contract. If PBPs are deemed practical, the government must evaluate and negotiate the details of the PBP schedule.

"The Excel-based analysis tool we developed will allow the contracting officer and industry to easily compare the financial cost and benefits of using PBPs versus customary progress payments. The model will also determine a win-win price that equitably accounts for the cost, benefits and potential risks associated with PBPs. This tool can be found on the Cost, Pricing and Finance section of our website, under PBP Analysis Tool, at: **PBP Tool: http://www.acq.osd.mil/dpap/cpf/Performance_based_payments.html**."

PAPER VERSIONS OF FMR AND FTR DISCONTINUED

The General Services Administration (GSA) has announced that it will no longer produce the looseleaf version of the Federal Management Regulation (FMR) and the Federal Travel Regulation (FTR) "as part of GSA's effort to increase efficiency and reduce and attain the goal of zero environmental impact (ZEF)."

Looseleaf pages of the FMR and the FTR were originally made available at a time when it was the only means to view a change to either regulation in context with the existing text until the publication of the next volume of Title 41 of the Code of Federal Regulations (CFR) each July 1 (41 CFR is where GSA promulgates the FMR and FTR). Patrons who maintained the regulations in looseleaf could purchase subscriptions from the Government Printing Office (GPO) and when any change to the FMR or FTR occurred, they would be sent the new pages.

With today's technologies, those who follow the FMR and FTR can view and print the latest changes on the day the changes are published in the ***Federal Register***. GSA has come to the conclusion that the time that it takes to produce the pages for information already available is not an efficient use of government resources and has decided to discontinue the production of the looseleaf versions of the FMR and FTR immediately. In addition, printing updated pages for those maintaining looseleaf binders of the regulations will no longer be necessary and this supports GSA's goal of a zero environmental footprint.

The FMR and related documents can be found at **http://www.gsa.gov/fmr**. The FTR and related documents can be found at **http://www.gsa.gov/ftr**.

EYEGLASS FRAMES NONMANUFACTURER WAIVER PROPOSED

The Small Business Administration (SBA) is proposing to waive the nonmanufacturer rule for Optical Eyeglass Frames, Product Service Code (PSC) 6540 (Ophthalmic Instruments, Equipment, and Supplies), under the North American Industry Classification System (NAICS) code 339115 (Ophthalmic Goods Manufacturing). SBA is inviting the public to comment on this proposed waiver or to provide information on potential small business sources for these products by May 12, 2011, to Amy Garcia, Procurement Analyst, Small Business Administration, Office of Government Contracting, 409 3rd Street, SW, Suite 8800, Washington, DC 20416.

The SBA regulation on the nonmanufacturer rule is in Title 13 of the Code of Federal Regulations (CFR), Business and Credit Administration; Part 121, Small Business Size Standards; under paragraph (b) of Section 121.406, How Does a Small Business Concern Qualify to Provide Manufactured Products Under Small Business Set-Aside or MED [Minority Enterprise Development] Procurements? The SBA regulation on the waiver of the nonmanufacturer rule is 13 CFR 121.1202, When Will a Waiver of the Nonmanufacturer Rule Be Granted for a Class of Products? A complete list of products for which the nonmanufacturer rule has been waived is available at **http://www.sba.gov/idc/groups/public/documents/sba_program_office/class_waiver.pdf**.

STATE ADOPTS PIV PROCEDURES

The Department of State (DOS) is adding a contract clause to the DOS Acquisition Regulation (DOSAR) to implement its procedures regarding personal identity verification (PIV) of contractor personnel, as required by Homeland Security Presidential Directive 12 (HSPD-12), Policies for a Common Identification Standard for Federal Employees and Contractors, and Federal Information Processing Standards Publication (FIPS PUB) Number 201, Personal Identity Verification (PIV) of Federal Employees and Contractors. This clause, DOSAR 652.204-70, Department of State Personal Identification Card Issuance Procedures, will apply to

contracts that require contractor employees to perform on-site at a DOS location and/or that require contractor employees to have access to DOS information systems.

DOSAR 652.204-70 directs contractors to an Internet Web site document at **http://www.state.gov/m/ds/rls/rpt/c21664.htm** that outlines the personal identity verification procedures for various types of contractors (cleared and uncleared), location of performance (domestic and overseas facilities), and the access requirements (physical and/or logical). The document itself, Department of State Personal Identification Card Policy and Procedures, is at **http://www.state.gov/documents/organization/121534.pdf**. In addition, DOSAR 652.237-71, Identification/Building Pass, is removed.

No comments were submitted in response to the proposed rule, so it is finalized without changes. For more on the proposed rule, see the December 2007 ***Federal Contracts Perspective*** article "Clause Addressing HSPD-12 Proposed for DOSAR."

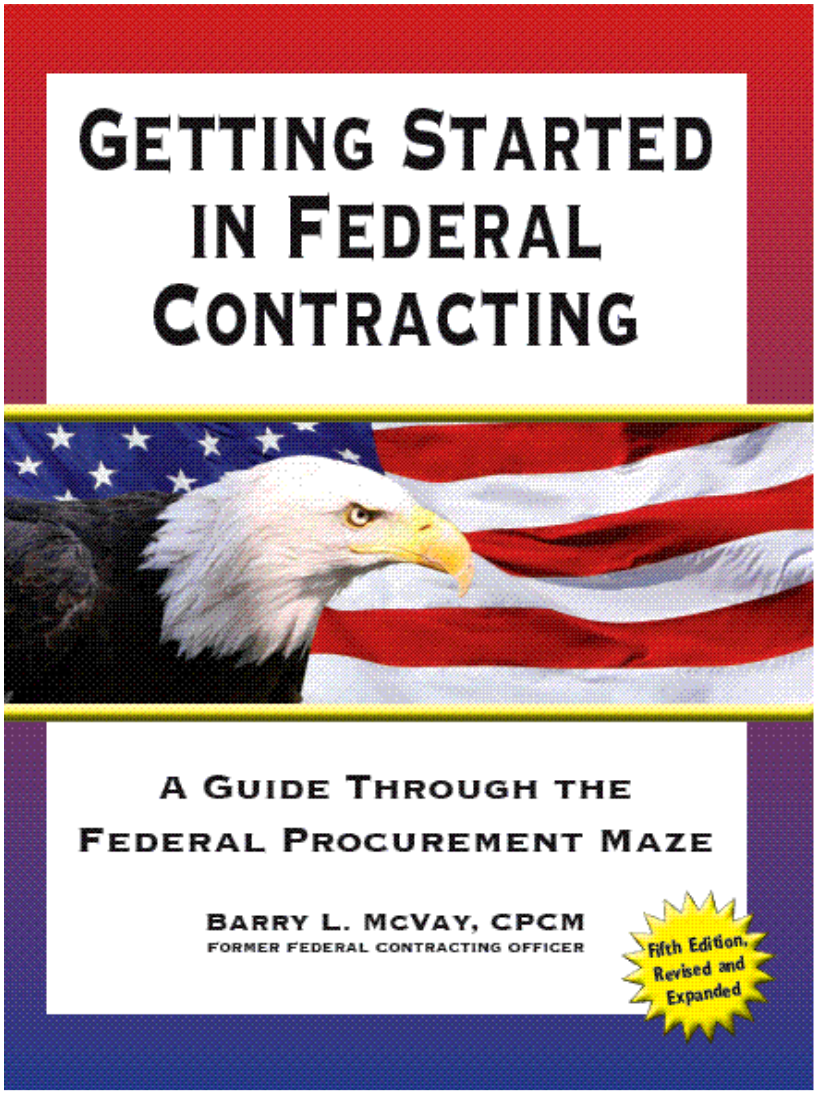
AGENCIES TO DEVELOP TELEWORK PURCHASING PROCEDURES

The Office of Management and Budget (OMB) director Jacob Lew has issued a memorandum to the heads of departments and agencies directing them to develop procedures on "purchasing computing technologies and services to enable and promote continued adoption of telework."

Lew gives agency chief information officers (CIOs), in conjunction with agency chief acquisition officers (CAOs), 90 days to develop or update policies that address the information security threats raised by use of technologies associated with telework. Agency policies must address the following:

- Selecting and acquiring information technology that best fits the needs of the federal government, and is technology and vendor neutral in acquisitions;
- Determination of allowable information technology products and services, to include remote access servers, client devices, and internal resources accessible through remote access;
- Prioritizing use of government-wide and agency-wide contracts, to the maximum extent possible, for new acquisitions and renewal of services to leverage the government's buying power;
- Deploying new and modernizing existing agency IT systems and infrastructure to support agency teleworking requirements;
- Compliance of all devices and infrastructure with federal security and privacy requirements; and
- Proper disposal of devices no longer in use to ensure protection of sensitive information.

OMB plans to issue a memorandum by June 7, 2011, that provides guidelines to ensure the adequacy of information and security protections for information and information systems used while teleworking.



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