Panoptic Enterprises'

FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

Vol. XII, No. 7 **July 2011**

ENERGY PRIORITIES AND ALLOCATIONS SYSTEM EXPANDED TO PROMOTE THE NATIONAL DEFENSE

The Department of Energy (DOE) has published standards and procedures establishing the Energy Priorities and Allocations System (EPAS) to comply with the Defense Production Act Reauthorization of 2009 requirement to publish regulations providing standards and procedures for prioritization of contracts and orders and for allocation of materials, services, and facilities to promote the national defense.

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The EPAS has two principal components: priorities and allocations. Under the priorities component, certain contracts between the government and private parties or between private parties for the production or delivery of industrial resources are required to be given priority over other contracts to facilitate expedited delivery in promotion of the U.S. national defense. Under the allocations component, materials, services, and facilities may be allocated to promote the national defense. For both components, the term "national defense" is defined broadly and can include critical infrastructure protection and restoration, emergency preparedness, and recovery from natural disasters.

Title 10 of the Code of Federal Regulations (CFR), Part 216 (10 CFR Part 216), Materials Allocation and Priority Performance Under Contracts or Orders to Maximize Domestic Energy Supplies, implements DOE's administration of priorities and allocations actions to maximize domestic energy supplies as authorized by under Section 101(c) of the Defense Production Act (Title 50 of the U.S. Code, Appendix Title I, Priorities and Allocations (Section 2071 *et seq*.)) (DPA). The Defense Production Act Reauthorization of 2009 (DPAR) (Public Law 111-67) required all agencies to which the president has delegated priorities and allocations authority under Title I of the DPA to publish regulations providing standards and procedures for prioritization of contracts and orders and for allocation of materials, services and facilities to promote the national defense.

This rule is DOE's fulfillment of the DPAR's requirement with regard contracts and orders that promote the national defense with regards to domestic energy supplies, and it expands upon 10 CFR Part 216 with the addition of 10 CFR Part 217, Energy Priorities and Allocations System.

10 CFR Part 217 is divided into nine subparts:

Subpart A, General, states the purpose of the regulation.
Subpart B, Definitions, provides definitions for the relevant regulatory terms.
Subpart C, Placement of Rated Orders, addresses DOE's priorities authorities.
Subpart D, Special Priorities Assistance, describes instances in which DOE can provide assistance in resolving matters related to priority rated contracts and orders.
Subpart E, Allocation Actions, provides detailed information on the procedures governing allocations actions. Allocations actions would most likely be used in extreme circumstances, such as in response to a national emergency.
Subpart F, Official Actions, provides the specific official actions the DOE may take to implement the provisions of the EPAS. These official actions include Rating Authorizations, Directives, and Memoranda of Understanding.
Subpart G, Compliance, provides DOE the authority to enforce the administration of the DPA and other applicable statutes, the EPAS regulation, or an official action. Willful violations of the provisions of Title I of the DPA, the EPAS regulation, or a DOE official action, are criminal acts punishable as provided in the DPA and Section 217.74, Violations, Penalties, and Remedies.
Subpart H, Adjustments, Exceptions, and Appeals, establishes the procedures to request an adjustment or exception to the provisions of the EPAS on the grounds of exceptional hardship or compliance would be contrary to the intent of the DPA.
Subpart I, Miscellaneous Provisions, addresses a number of remaining issues, including protection against claims, records and reports, applicability issues, and communications.

Under the EPAS, DOE or its Delegate Agency ("a federal government agency authorized by delegation from the Department of Energy to place priority ratings on contracts or orders needed to support approved programs") designates certain orders as one of two possible priority levels: "DO" or "DX". Once so designated, such orders are referred to as "rated orders." All DO-rated orders have equal priority with each other and take precedence over unrated orders. All DX-rated orders have equal priority with each other and take precedence over DO-rated orders and unrated orders. The recipient of a rated order must give it priority over an unrated order or an order with a lower priority rating. A recipient of a rated order may place orders at the same priority level with suppliers and subcontractors for supplies and services necessary to fulfill the recipient's rated order and the suppliers, and subcontractors must treat the request from the rated order recipient as a rated order with the same priority level as the original rated order. The rule does not require recipients to fulfill rated orders if the price or terms of sale are not consistent with the price or terms of sale of similar non-rated orders. The rule provides a defense from any liability for damages or penalties for actions taken in, or inactions required for, compliance with the rule.

The EPAS operates very similarly to the Defense Priorities and Allocations System (DPAS). For more information on DPAS, go to the DPAS website at **http://www.bis.doc.gov/dpas**.

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

DFARS RULES ALL OVER THE PLACE!

The Department of Defense (DOD) continues its revamping of the Defense Federal Acquisition Regulation Supplement (DFARS) during July, issuing eight final rules, four interim rules, three proposed rules, two class deviations, one determination cancellation, and two policy memoranda!

■ **Agency Office of the Inspector General:** This final rule makes some administrative corrections relating to DFARS 252.203-7003, Agency Office of the Inspector General.

The clause prescription for DFARS 252.203-7003 at DFARS 203.1004, Contract Clauses, states that the clause is used in solicitations and contracts that include Federal Acquisition Regulation (FAR) 52.203-13, Contractor Code of Business Ethics and Conduct. FAR 52.203-13 is applicable to commercial items and is listed in FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items. FAR 52.203-13(b)(3)(i) requires the contractor to make disclosures to the agency office of the Inspector General, so the contractor needs to know the address of the agency office of the Inspector General. However, DFARS 252.203-7003, which provides the address of the DOD Office of the Inspector General, is not included in DFARS 252.212-7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items, which lists the clauses that must be included in DOD contracts for commercial items to implement statutes or executive orders. To remedy that omission, this rule adds DFARS 252.203-7003 to DFARS 252.212-7001. Also, the list of clauses in DFARS 252.212-7001 is updated.

■ **Warranty Tracking of Serialized Items:** This finalizes, with changes, the proposed rule that would revise DFARS Subpart 246.7, Warranties, to define the requirements to track warranties for items subject to Item Unique Identification (IUID) in the IUID registry, thus significantly enhancing the ability of DOD to identify and enforce warranties, ensuring sufficient durations of warranties for specific goods, and realizing improved material readiness.

One respondent submitted comments on the proposed rule (see the September 2010 ***Federal Contracts Perspective*** article "Defense Acquisition-Related Thresholds Adjusted, Too"), and paragraph (a)(4)(iii) of DFARS 211.274-2, Policy for Unique Item Identification, is changed as a result to require "any warranted serialized item," regardless of value, to have a unique item identification, instead of "any warranted item". This clarifies that the existence of a warranty does not solely create a criterion for IUID applicability.

However, during the development of the final rule, DOD decided to restructure the layout of the rule "to reduce burden to contractors and to facilitate data capture." This change required moving Table I, Warranty Tracking Information, and Table II, Warranty Repair Source Information, from DFARS 252.246-7006, Warranty Tracking of Serialized Items (proposed DFARS 252.246-70YY), to a new DFARS 246.710-70, Warranty Attachment. The two new attachments are "Attachment ___: Warranty Tracking Information," and "Attachment___: Warranty Repair Source Instructions." This change was made because electronic business systems are being expanded to capture the data elements needed to support warranty tracking. To facilitate data capture, the tables for warranty data have been translated into an XML attachment schema available at **http://www.acq.osd.mil/dpap/pdi/eb/gfp.html**. This format can be embedded in the contract data file by the contract writing system, or sent in parallel as a separate

attachment. This schema will enable data flow from system to system. Data flow from a clause is not possible because the clause is text, not data. Carrying the data in an attachment will make the flowing of the data to the various business systems possible without modifying every DOD contract writing system.

The following is a summary of other technical changes related to the restructuring:

- To DFARS 246.701, Definitions, is added the statement that the definitions of "ded references to "duration", "enterprise", "enterprise identifier", "fixed expiration", "issuing agency", "item type", "starting event", "serialized item", "unique item identifier", "usage", "warranty administrator", "warranty guarantor", "warranty repair source", and "warranty tracking" are in DFARS 252.246-7006, Warranty Tracking of Serialized Items.

- Paragraph (5) of DFARS 246.710, Solicitation Provision and Contract Clauses, is revised to remove references to Tables I and II (DFARS 252.246-7005, Notice of Warranty Tracking of Serialized Items, and DFARS 252.246-7006, are similarly revised).

- In paragraph (a) of DFARS 252.211-7003, Item Identification and Valuation, the definition of "issuing agency" is revised to replace "a non-repeatable identifier" with "a globally unique identifier" (the same change is made to the definition of "issuing agency" in DFARS 252.246-7006).

■ **Successor Entities to the Netherlands Antilles:** This final rule amends the definitions of "Caribbean Basin country" and "designated country" in DFARS 252.225-7021, Trade Agreements, and DFARS 252.225-7045, Balance of Payments Program – Construction Materials Under Trade Agreements, to reflect the change in the political status of the islands that comprised the Netherlands Antilles.

On October 10, 2010, Curacao and Sint Maarten became autonomous territories of the Kingdom of the Netherlands. Bonaire, Saba, and Sint Eustatius now fall under the direct administration of the Netherlands.

The Netherlands Antilles was designated as a beneficiary country under the Caribbean Basin Initiative. According to the initiative, successor political entities remain eligible as beneficiary countries. Therefore, the definitions have been revised to replace "Netherlands Antilles" with the names of the five separate successor entities.

■ **Inclusion of Option Amounts in Limitations on Authority of DOD to Carry Out Certain Prototype Projects:** This final rule amends DFARS Subpart 212.70, Pilot Program for Transition to Follow-On Contracting After Use of Other Transaction Authority, to implement Section 826 of the National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383), which amended the DOD pilot program for transition to follow-on contracting after use of other transaction authority, to establish that the threshold limitation of $50,000,000 for contracts and subcontracts under the program includes the dollar value of all options. To do that, DFARS 212.7002-3, Thresholds, is added, which states, "The contract and subcontract thresholds at [DFARS] 212.7002-1(a)(3) [Contracts Under the Program] and [DFARS] 212.7002-2(a)(2) [Subcontracts Under the Program] include the dollar value of all options in accordance with Section 826 of the National Defense Authorization Act for Fiscal Year 2011. See also FAR 1.108(c) [FAR Conventions]."

■ **Assignment of Order Codes:** This final rule amends DFARS 204.7005, Assignment of Order Codes, to specify Defense Procurement and Acquisition Policy, Program Development and Implementation, as the office responsible for the maintenance of all order code assignments for use in the first two positions of an order number when an activity places an order against another activity's contract or agreement. In addition, the procedures and addresses for order code monitors are moved to the DFARS companion resource, the DFARS Procedures, Guidance, and Information (**http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html**).

■ **Extension of Restrictions on the Use of Mandatory Arbitration Agreements:** This final rule amends DFARS Subpart 222.74, Restrictions on the Use of Mandatory Arbitration Agreements, to extend the restriction on the use of mandatory arbitration agreements when awarding contracts that exceed $1,000,000 using Fiscal Year 2011 and subsequent fiscal year funds appropriated or otherwise made available by the DOD and Full-Year Continuing Appropriations Act for Fiscal Year 2011 (Public Law 112-10) or any subsequent DOD appropriations act. Section 8102 of Public Law 112-10 extends the restrictions of Section 8116 of the Defense Appropriations Act for Fiscal Year 2010 (Public Law 111-118).

Section 8116 of Public Law 111-118 prohibited the use of mandatory arbitration agreements when using funds appropriated by Public Law 111-118 for any contract that exceeds $1,000,000 (including task or delivery orders and bilateral modifications adding new work), if the contractor restricts its employees or independent contractors to arbitration for claims "under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention." DFARS Subpart 222.74 and the associated clause DFARS 252.222-7006, Restrictions on the Use of Mandatory Arbitration Agreements, did not apply to the acquisition of commercial items, including commercially available off-the-shelf items.

To make DFARS Subpart 222.74 and DFARS 252.222-7006 applicable to Public Law 112-10 and subsequent appropriations acts with the same restriction on the use of mandatory arbitration agreements, the phrase "using funds appropriated or otherwise made available by the Fiscal Year 2010 Defense Appropriations Act (Pub. L. 111-118)" is changed to "using funds appropriated or otherwise made available by the Fiscal Year 2010 Defense Appropriations Act (Pub. L. 111-118) *or subsequent DOD appropriations acts*" in paragraphs (a) and (b) of DFARS 222.7402, Policy, and DFARS 222.7405, Contract Clause. Similar changes are made to (a)(xi) of DFARS 212.503, Applicability of Certain Laws to Executive Agency Contracts for the Acquisition of Commercial Items, paragraph (a)(xix) of DFARS 212.504, Applicability of Certain Laws to Subcontracts for the Acquisition of Commercial Items, and DFARS 222.7400, Scope of Subpart.

For more on the DFARS implementation of Section 8116 of Public Law 111-118, see the January 2011 ***Federal Contracts Perspective*** article "DOD Continues Its Rampage Through the DFARS."

■ **Definition of Sexual Assault:** This rule adopts, with changes, the proposed rule that would amend DFARS 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, to ensure contractor employees accompanying U.S. Armed Forces are made aware of the DoD definition of sexual assault as defined in DOD

Directive (DODD) 6495.01, Sexual Assault Prevention and Response Program (**http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf**).

The proposed rule would add paragraph (d)(3) to DFARS 252.225-7040, to require contractors to ensure that contractor employees accompanying U.S. Armed Forces are aware of the DOD definition of "sexual assault" in DODD 6495.01, and that such offenses are covered under the Uniform Code of Military Justice (Title 10, Chapter 47) (**http://www.constitution.org/mil/ucmj19970615.htm**). Two respondents submitted comments in support of the proposed rule. However, the following clarifying changes were made to the final rule:

- Clarify that *many* of the offenses addressed in DODD 6495.01 are covered under the Uniform Code of Military Justice. The proposed rule would have stated that "such offenses are covered under the Uniform Code of Military Justice."

- Add a requirement that the contractor ensure its employees accompanying U.S. Armed Forces are aware "that the offenses not covered by the Uniform Code of Military Justice may nevertheless have consequences to the contractor employees," and references paragraph (h)(1) of the clause ("the contracting officer may direct the contractor, at its own expense, to remove and replace any contractor personnel who jeopardize or interfere with mission accomplishment or who fail to comply with or violate applicable requirements of this contract").

For more on the proposed rule, see the December 2010 ***Federal Contracts Perspective*** "Another Deluge of DFARS Changes."

■ **Synchronized Predeployment and Operational Tracker (SPOT):** This final rule amends the DFARS to update the nomenclature associated with the letter of authorization required for contractor personnel to process through a deployment center or travel to, from, or within a designated operational area. This rule revises the generic letter of authorization (LOA) to use the formal title of "Synchronized Predeployment and Operational Tracker (SPOT)-generated letter of authorization." Also, the rule addresses internal contract administration requirements associated with the SPOT system. (**NOTE:** Additional information on contractor compliance with SPOT business rules, guidance on clauses to consider using, and a sample LOA are in DFARS Procedures, Guidance, and Information (PGI) 225.7402.)

This final rule makes the following changes:

- Paragraph (e) of DFARS 225.7402-3, Government Support, is revised to require contractor personnel to have a SPOT-generated LOA to process through a deployment center or to travel to, from, or within the designated operational area. Also, the LOA will identify any additional authorizations, privileges, or government support the contractor personnel are entitled to under the contract.

- Paragraph (a)(S-72) is added to DFARS 242.302, Contract Administration Functions, to add the following function to the contract administration office: "Ensure implementation of the Synchronized Predeployment and Operational Tracker (SPOT) by the contractor and maintain surveillance over contractor compliance with SPOT business rules available

at the Web site provided at PGI 225.7402-5(a)(iv) [**http://www.acq.osd.mil/log/PS/SPOT/SPOT_Business_Rules_Web_10-07-10.pdf**] for contracts incorporating the clause at 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States."

– Paragraph (c)(4) of DFARS 252.225-7040, Contractor Personnel Authorized To Accompany U.S. Armed Forces Deployed Outside the United States, reiterates the information in DFARS 225.7402-3(e).

■ **Foreign Acquisition Amendments:** This final rule amends the DFARS to correct several anomalies resulting from recent changes relating to source of ball and roller bearing components, participation of foreign contractors in acquisitions in support of operations in Afghanistan, and eligibility of Peruvian end products under trade agreements.

– Restriction on Ball and Roller Bearings**:** An earlier final rule revised the domestic source restriction on the acquisition of ball and roller bearings in DFARS 225.7009, Restriction on Ball and Roller Bearings, and DFARS 252.225-7016, Restriction on Acquisition of Ball and Roller Bearings, by adding a new requirement that (1) the bearings are to be manufactured in the United States or Canada; and (2) for each ball or roller bearing, the cost of the bearing components mined, produced, or manufactured in the United States or Canada must exceed 50% of the total cost of the bearing components of that ball or roller bearing (see the January 2011 ***Federal Contracts Perspective*** article "DOD Continues Its Rampage Through the DFARS").

  The phrase "mined, produced, or manufactured" was adopted from the Buy American Act, but bearing components are manufactured items, not mined or produced. Therefore, the words "mined, produced or" are removed from both DFARS 225.7009(a)(2) and DFARS 252.225-7016(b)(2).

– Foreign Participation in Acquisitions in Support of Operations in Afghanistan: An earlier final rule added DFARS 225.7704, Acquisitions of Products and Services from South Caucasus/Central and South Asian (SC/CASA) State in Support of Operations in Afghanistan, to allow acquisition from the nine SC/CASA states (Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkmenistan, and Uzbekistan) by waiving the Trade Agreements Act prohibition on acquisitions of products or services from non-designated countries, and waiving the provisions of the Balance of Payments Program for offers of products (other than arms, ammunition, or war materials) and construction materials from these SC/CASA states acquired in direct support of operations in Afghanistan. Implementing solicitation provisions and contract clauses were prescribed as alternates to the Buy American – Trade Agreements – Balance of Payments Program solicitation provisions and contract clauses (see the January 2011 ***Federal Contracts Perspective*** article "DOD Continues Its Rampage Through the DFARS").

  The rule added Alternate II to DFARS 252.225-7021, Trade Agreements, and it included the following as new paragraph (d): "If the contractor is from an SC/CASA state, the contractor shall inform its government of its participation in this acquisition and that it generally will not have such opportunity in the future unless its

government provides reciprocal procurement opportunities to U.S. products and services and suppliers of such products and services." However, paragraphs (d) of Alternates II and III of DFARS 252.225-7045, Balance of Payments Program – Construction Material Under Trade Agreements, inadvertently omitted the words "If the contractor is from an SC/CASA state". Since these alternates would be meaningless if the contractor is from a non-SC/CASA state, the inadvertently omitted words are added to paragraph (d) of Alternates II and III of DFARS 252.225-7045.

– Trade Agreements – Peru: The earlier SC/CASA state rule mentioned above was used for administrative convenience to correct DFARS 252.225-7035, Buy American Act – Free Trade Agreements–Balance of Payments Program Certificate, and DFARS 252.225-7036, Buy American Act – Free Trade Agreements – Balance of Payments Program, so that Peruvian end products are not erroneously treated as eligible products in acquisitions that do not exceed the World Trade Organization (WTO) Government Procurement Agreement (GPA) threshold, in accordance with the Peruvian Free Trade Agreement (the WTO GPA threshold is currently $203,000 for supplies and services and $7,804,000 for construction). DOD amended DFARS 252.225-7035 and DFARS 252.225-7036 to add a definition of Peruvian end products and add "Peruvian end products" to the Free Trade Agreement country end products that are not eligible products.

  However, this created an inconsistency between DFARS 252.225-7035 and its Alternate I. DFARS 252.225-7035(b)(2) includes the phrase "Free Trade Agreement country end products other than Bahrainian end products or Moroccan end products, or Peruvian end products." The instructions for changes to Alternate I (which limits the applicable Free Trade Agreements to just Canada) misquote the phrase that is to be removed and replaced – "substitute the phrase 'Canadian end products' for the phrase 'Free Trade Agreement country end products other than Bahrainian end products or Moroccan end products' in paragraphs (b)(2) and (c)(2)(ii) of the basic provision'." Therefore, to remedy the omission of "Peruvian end products" from the removal instruction, new instructions are provided: "substitute the phrase 'Canadian end products' for the phrase 'Free Trade Agreement country end products other than Bahrainian end products, Moroccan end products, or Peruvian end products' in paragraphs (b)(2) and (c)(2)(ii) of the basic provision."

■ **Fire-Resistant Fiber for Production of Military Uniforms:** This interim rule implements Section 821 of the National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383), which prohibits specification of the use of fire-resistant rayon fiber in solicitations issued before January 1, 2015, by adding DFARS 225.7016, Prohibition. DFARS 225.7016 states, "In accordance with Section 821 of the National Defense Authorization Act for Fiscal Year 2011, do not include in any solicitation issued before January 1, 2015, a requirement that proposals submitted pursuant to such solicitation shall include the use of fire-resistant rayon fiber."

Comments on this interim rule must be submitted no later than August 5, 2011, identified as "DFARS Case 2011-D021," 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 System, Attn: Amy Williams, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items:** This interim rule adds DFARS Subpart 212.71, Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items, and associated provision DFARS 252.212-7002 (with the same title), to implement Section 866 of the National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383), which authorizes the Secretary of Defense to establish a pilot program to assess the feasibility and advisability of acquiring military-purpose nondevelopmental items in accordance with the streamlined procedures of the pilot program.

Under this pilot program, DOD may enter into contracts with "nontraditional defense contractors" for the purpose of:

- Enabling DOD to acquire items that otherwise might not have been available to DOD;
- Assisting DOD in the rapid acquisition and fielding of capabilities needed to meet urgent operational needs; and
- Protecting the interests of the United States in paying fair and reasonable prices for the item or items acquired.

The pilot program is designed to test whether the streamlined procedures, similar to those available for commercial items, can serve as an effective incentive for nontraditional defense contractors to (1) channel investment and innovation into areas that are useful to DOD, and (2) provide items developed exclusively at private expense to meet validated military requirements.

A "nontraditional defense contractor" is "an entity that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any of the following for the Department of Defense: (1) any contract or subcontract that is subject to full coverage under the cost accounting standards…; or (2) any other contract in excess of the certified cost or pricing data threshold [currently $700,000] under which the contractor is required to submit certified cost or pricing data" (DFARS 252.212-7002).

According to DFARS 212.7102-1, Contracts Under the Program, a contract with nontraditional defense contractors for the acquisition of military-purpose nondevelopmental items must:

(a) Be awarded using competitive procedures;
(b) Be a firm-fixed-price contract, or a fixed-price contract with an economic price adjustment clause;
(c) Be in an amount not in excess of $50,000,000;
(d) Provide –
    (1) For the delivery of an initial lot of production quantities of completed items not later than nine months after the date of the award of such contract; and
    (2) That failure to make delivery as provided for under paragraph (d)(1) may result in termination for cause; and
(e) Be –
    (1) Exempt from the requirement to submit certified cost or pricing data;
    (2) Exempt from the cost accounting standards under section 26 of the Office of Procurement Policy Act (41 U.S.C. 1502); and

(3) Subject to the requirement to provide data other than certified cost or pricing data for the purpose of price reasonableness determinations.

The authority for this pilot program expires on January 6, 2016.

Comments on this interim rule must be submitted no later than August 29, 2011, identified as "DFARS Case 2011-D034," 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 System, Attn: Manuel Quinones, OUSD (AT&L) DPAP(DAR), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Management of Manufacturing Risk in Major Defense Acquisition Programs:** This interim rule amends DFARS 215.304, Evaluation Factors and Significant Subfactors, to implement paragraph (b)(5) of Section 812 of the National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383), which instructs DOD to issue guidance that, at a minimum, shall "require appropriate consideration of the manufacturing readiness and manufacturing readiness processes of potential contractors and subcontractors as a part of the source selection process for major defense acquisition programs."

To implement Section 812(b)(5), DFARS 215.304(c)(iv) is added, which states, "In accordance with Section 812 of the National Defense Authorization Act for Fiscal Year 2011, consider the manufacturing readiness and manufacturing-readiness processes of potential contractors and subcontractors as a part of the source selection process for major defense acquisition programs."

Comments on this interim rule must be submitted no later than August 29, 2011, identified as "DFARS Case 2011-D031," 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 System, Attn: Dustin Pitsch, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Definition of "Qualifying Country End Product":** This proposed rule would amend the definition of "qualifying country end product" by eliminating the component test for qualifying country end products that are commercially available off-the-shelf (COTS) items.

Under the Buy American Act, there is a two-part test to define a domestic end product: (1) the product must be manufactured in the United States; and (2) the cost of domestic components must exceed 50% of the cost of all the components. Paragraph (a)(2) of FAR 25.101, General, states, "In accordance with 41 U.S.C. 431, this component test of the Buy American Act has been waived for acquisitions of COTS items…" Likewise, DOD waived the component test for the DFARS definition of "domestic end product" (see the January 2010 ***Federal Contracts Perspective*** article "Slew of DOD Memos and DFARS Changes"). These changes were based on a determination signed by the Administrator for Federal Procurement Policy on February 14, 2008, regarding laws applicable to the acquisition of COTS items. According to the determination, the component test of the Buy American Act does not apply to COTS items.

The definition of "qualifying country end product" is not statutory, but it was modeled after the definition of "domestic end product" as a matter of policy. So, as a matter of policy, it is within the authority of DOD to waive the component test for qualifying country end products that are COTS items, so that it will not be necessary to try to track the origin of components of COTS items that are manufactured in a qualifying country to determine that an end product is a

qualifying country end product. Therefore, the component test would be removed from the definition of "qualifying country end product" for qualifying country end products that are commercially available off-the-shelf items from DFARS 252.225-7001, Buy American Act and Balance of Payments Program, DFARS 252.225-7021, Trade Agreements, and DFARS 252.225-7036, Buy American Act – Free Trade Agreements – Balance of Payments Program.

Comments on this proposed rule must be submitted no later than August 5, 2011, identified as "DFARS Case 2011-D028," 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 System, Attn: Amy Williams, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Representation Relating to Compensation of Former DOD Officials:** This proposed rule would require that offerors represent whether former DOD officials employed by the offeror are in compliance with post-employment restrictions.

The principal statutory restrictions concerning post-government employment for DOD and other federal employees after leaving government employment are 18 U.S.C. 207 and 41 U.S.C. 2104, and 5 CFR Parts 2637 and 2641.

18 U.S.C. 207 prohibits an individual from representing a contractor to his or her former agency on particular matters involving specific parties that he or she handled while working for the federal government for defined cooling-off periods that vary according to the former official's involvement and position.

41 U.S.C. 2104 prohibits DOD and other government acquisition officials from accepting compensation from a defense contractor during a one year cooling-off period if the official performed certain duties at DOD involving the contractor and a contract valued in excess of $10,000,000. However, the individual may accept employment from a division or affiliate that does not produce the same or similar items.

FAR 3.104, Procurement Integrity, implements 18 U.S.C. 207 and 41 U.S.C. 2104, and DFARS 203.104, Procurement Integrity, is DOD's implementation of 18 U.S.C. 207 and 41 U.S.C. 2104.

In addition, DFARS 203.171, Senior DOD Officials Seeking Employment with Defense Contractors, implements Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181). According to DFARS 203.171-3, Scope, defense contractors may not knowingly provide compensation to "covered DOD officials" (as defined by DFARS 252.203-7000, Requirements Relating to Compensation of Former DOD Officials) who left government employment on or after January 28, 2008, unless the contractor first determines that the former employee has received, or has requested at least 30 days prior to receiving compensation from the contractor, a post-employment ethics opinion regarding post-employment restrictions. The DFARS does not require additional action from the DOD contractor or covered employee in the event that the covered employee has not received an opinion on post-employment restrictions, nor does DFARS 252.203-7000 cover former DOD employees who left the government prior to January 28, 2008.

To remedy this deficiency, this proposed rule would add DFARS 252.203-70XX, Representation Relating to Compensation of Former DOD Officials, which would require offerors to submit representations at the time of contract award that all former DOD officials that are covered by the Procurement Integrity Act are in compliance with post-employment restrictions in DFARS 203.171-3 and DFARS 252.203-7000. Also, the provision requires a

representation that former DOD employees employed by the contractor are also in compliance with additional post-employment restrictions of 18 U.S.C. 207 and 5 CFR Parts 2637 and 2641, including FAR 3.104-2, General [for procurement integrity].

This provision would be required in all solicitations and contracts, including those for commercial items, because this representation is an enforcement mechanism for DFARS 252.203-7000, which is required in contracts for commercial items.

Comments on this proposed rule must be submitted no later than August 5, 2011, identified as "DFARS Case 2010-D020," 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 System, Attn: Meredith Murphy, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Safeguarding Unclassified DOD Information:** This proposed rule would add DFARS Subpart 204.74, Safeguarding Unclassified DOD Information, and associated contract clauses to implement adequate security measures to safeguard unclassified DOD information within contractor information systems from unauthorized access and disclosure, and to prescribe reporting to DOD with regard to certain cyber intrusion events that affect DOD information resident on or transiting through contractor unclassified information systems. DFARS Subpart 204.74 would not apply to voice information.

Proposed DFARS 204.7402, Policy, states that (1) basic safeguarding requirements as specified in DFARS 252.204-70XX, Basic Safeguarding of Unclassified DOD Information, are required for any DOD information; and (2) enhanced safeguarding requirements, including cyber incident reporting as specified in DFARS 252.204-70YY, Enhanced Safeguarding of Unclassified DOD Information, are required for DOD information that is:

- Designated as critical program information in accordance with DOD Instruction 5200.39, Critical Program Information (CPI) Protection Within the Department of Defense (**http://www.dtic.mil/whs/directives/corres/pdf/520039p.pdf**);
- Designated as critical information in accordance with DOD Directive 5205.02, DOD Operations Security (OPSEC) Program (**http://www.dtic.mil/whs/directives/corres/pdf/520502p.pdf**);
- Subject to export controls under International Traffic in Arms Regulations and Export Administration Regulations (**http://www.pmddtc.state.gov/regulations_laws/itar_official.html**);
- Exempt from mandatory public disclosure under DOD Directive 5400.07, DOD Freedom of Information Act (FOIA) Program (**http://www.dtic.mil/whs/directives/corres/pdf/540007p.pdf**), and DOD Regulation 5400.7-R, DOD Freedom of Information Program (**http://www.dtic.mil/whs/directives/corres/pdf/540007r.pdf**);
- Bearing current and prior designations indicating controlled access and dissemination (for example, For Official Use Only, Sensitive But Unclassified, Limited Distribution, Proprietary, Originator Controlled, Law Enforcement Sensitive);
- That is technical data, computer software, and any other technical information covered by DOD Directive 5230.24, Distribution Statements on Technical Documents (**http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf**), and DOD Directive

5230.25, Withholding of Unclassified Technical Data from Public Disclosure (**http://www.dtic.mil/whs/directives/corres/pdf/523025p.pdf**); or

– That is personally identifiable information including, but not limited to, information protected pursuant to the Privacy Act and the Health Insurance Portability and Accountability Act.

The rule would revise DFARS 252.204-7000, Disclosure of Information, to add definitions of "DOD information," and "nonpublic information," and add two clauses:

– DFARS 252.204-70XX, Basic Safeguarding of Unclassified DOD Information, which would require the implementation of first-level protection measures for the protection of government information to deter unauthorized disclosure, loss, or exfiltration by employing first-level information technology security measures.

– DFARS 252.204-70YY, Enhanced Safeguarding of Unclassified DOD Information, which would require enhanced information technology security measures applicable to the encryption of data for storage and transmission, network protection and intrusion detection, and cyber intrusion reporting. A cyber intrusion reporting requirement is planned for enhanced protection to assess the impact of loss and improve protection by better understanding the methods of loss.

DOD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities: "DOD estimates that the rule will apply to approximately 76% of DOD's small business contractors in that they will be required to provide protection of DOD information at the enhanced level…a reasonable rule of thumb for small businesses is that information technology security costs are approximately 0.5% of total revenues. Because there are economies of scale when it comes to information security, larger businesses generally pay only a fraction of that estimated cost as a percentage of total revenue."

Comments on this proposed rule must be submitted no later than August 29, 2011, identified as "DFARS Case 2010-D020," 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 System, Attn: Julian Thrash, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Class Deviation on Past Performance Reporting:** This class deviation directs contracting officers to use deviations to paragraph (c)(3)(i) of FAR 15.304, Evaluation Factors and Significant Subfactors, and paragraph (b) of FAR 42.1502, Policy [past performance evaluations], to increase the thresholds for evaluation of past performance information from the simplified acquisition threshold ($150,000) to $5,000,000 for systems and operations support contracts, and $1,000,000 for services and information technology contracts. The threshold remains the simplified acquisition threshold for all other contracts.

■ **Class Deviation on Accelerated Payments to Small Businesses:** This class deviation supersedes the earlier class deviation that directed the immediate implementation of DFARS 232.903, Responsibilities, and DFARS 232.906, Making Payments, which directed that payments to all small businesses be accelerated, not just to small disadvantaged businesses (see

the May 2011 ***Federal Contracts Perspective*** article "The Avalanche of DFARS Changes Keeps Piling Up").

"Effective immediately, all payments to small businesses processed through the Mechanization of Contract Administration Services (MOCAS) System will be processed in accordance with DFARS 232.903 and 232.906," writes Richard Dinman, Director of Defense Procurement and Acquisition Policy. "DOD is using a phased implementation approach because all DOD entitlement and payment systems require modification to accommodate accelerated payments to small businesses. The Defense Finance and Accounting Service has completed modifications of MOCAS to provide for these accelerated payments to small business. Phase-in of the remaining entitlement and payment systems will continue."

■ **Cancellation of Domestic Non-Availability Determination for Cationic - Dyeable Continuous Filament Polyester Tow:** This determination cancels the class determination of domestic non-availability (DNAD) for cationic - dyeable continuous filament polyester tow because domestic sources have been identified.

DFARS 225.7002, Restrictions on Food, Clothing, Fabrics, and Hand or Measuring Tools, implements the "Berry Amendment," which prohibits the acquisition of these items from foreign sources unless one of a number of exceptions applies. One of the exceptions allowing acquisition from foreign sources is "if the Secretary concerned determines that items grown, reprocessed, reused, or produced in the United States cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at U.S. market prices" (paragraph (b) of DFARS 225.7002-2, Exceptions).

On July 8, 2002, the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) determined there were no domestic sources for cationic - dyeable continuous filament polyester tow, thus permitting the acquisition of foreign tow. However, the Defense Logistics Agency (DLA) has identified three domestic sources for this tow, so the USD(AT&L) has cancelled the determination that there were no domestic sources. This cancellation means only domestic tow can be acquired by DOD.

■ **Awardee Search in the Federal Awardee Performance and Integrity Information System (FAPIIS) and the Excluded Parties List System (EPLS):** This memorandum from Richard Ginman, Director of Defense Procurement and Acquisition Policy, to the acquisition executives of the services and defense agencies, reminds them that FAR 9.104-6, Federal Awardee Performance and Integrity Information System, requires their contracting officers to consider all the information in the FAPIIS [**https://fapiis.ppirs.gov/**] when making a responsibility determination.

"The government FAPIIS site provides certain information that is found in the Central Contractor Registration (CCR) [**https://www.bpn.gov/ccr/default.aspx**], the Excluded Parties List System (EPLS) [**https://www.epls.gov/**] and the Past Performance Information Retrieval System (PPIRS) [**http://www.ppirs.gov/**]," writes Mr. Ginman. "The EPLS has information on individuals that are suspended, proposed for debarment, or debarred that is not available on the FAPIIS site. Therefore, contracting officers must examine the data in the EPLS in addition to using the information in FAPIIS to determine a prospective awardee's responsibility when considering and individual or entity for award. A recent review of the suspension and debarment process by the Inspector General's office found that awards were made to entities listed in the EPLS. Pursuant to FAR 9.405(d)(4) [Effect of Listing (on EPLS)], 'Immediately prior to award,

the contracting officer shall again review the EPLS to ensure that no award is made to a listed contractor.'"

■ **Increase Dynamic Small Business Role in the Defense Marketplace:** This memorandum from Richard Ginman, Director of Defense Procurement and Acquisition Policy, and Andre Gudger, Director of the Office of Small Business Programs, to the acquisition executives of the services and defense agencies, reminds them to "follow the procedures at FAR 7.104 [General Procedures [for acquisition plans)] to ensure that your small business specialists and, if possible, the SBA [Small Business Administration] procurement center representative are fully engaged in the acquisition planning process."

Mr. Ginman and Mr. Gudger continued, "solicitations and contracts that offer subcontracting possibilities, and that meet the other criteria in FAR 19.708(b) [Contract Clauses], must contain the clause at FAR 52.219-9 [Small Business Subcontracting Plan]. It requires that contracting officers review an offeror's small business subcontracting plan, and incorporate it as part of the contract. Contracting officers are reminded to include in the solicitations and contracts, where appropriate, the clause at FAR 52.219-10 [Incentive Subcontracting Program], with accompanying incentives, to motivate further contractors to meet and improve their small business participation efforts."

FAR RULES ON PRIORITIZING SUPPLY SOURCES, PERFORMANCE

Two proposed rules to change the Federal Acquisition Regulation (FAR) were published in July:

■ **Prioritizing Sources of Supplies and Services for Use by the Government:** This proposed rule would amend FAR Part 8, Required Sources of Supplies and Services, which currently requires agencies to satisfy their requirements for supplies and services from or through a list of sources in order of priority (FAR 8.002, Priorities for Use of Government Supply Sources), to eliminate outdated categories and to distinguish between government sources (for example, Federal Supply Schedules (FSS)) and private-sector sources.

The proposed rule would make the following changes:

- The title of FAR 8.002 would be revised to "Priorities for Use of Mandatory Government Sources," to indicate the section establishes the priorities for mandatory government sources. In addition, the word "sources" would be changed to "government sources" in paragraph (a). Also, from paragraph (a)(1), Supplies, would be removed "Mandatory Federal Supply Schedules," "Optional use Federal Supply Schedules," and "Commercial Sources." Finally, from paragraph (a)(2), Services, would be removed "Mandatory Federal Supply Schedules," "Optional use Federal Supply Schedules," and "Federal Prison Industries, Inc.", leaving "Services which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see Subpart 8.7)" as the only mandatory source for services.

- The title of FAR 8.003, Use of Other Government Supply Sources, would be changed to "Use of Other Mandatory Sources." The text would remain the same – it would still

address public utility services, printing and related supplies, leased motor vehicles, strategic and critical materials, and helium.

– FAR 8.004, Contract Clause, would be redesignated as FAR 8.005, and new FAR 8.004, Use of Other Sources, would be added. New FAR 8.004 would list non-mandatory sources that agencies are encouraged to consider after first considering the mandatory sources in FAR 8.002 and FAR 8.003.

  - Paragraph (a)(1) of FAR 8.004 would address supplies (Federal Supply Schedules, governmentwide acquisition contracts, multi-agency contracts, and any other procurement instruments intended for use by multiple agencies, including blanket purchase agreements (BPAs) under Federal Supply Schedule contracts (for example, Federal Strategic Sourcing Initiative (FSSI) agreements accessible at **http://www.gsa.gov/fssi**).
  - Paragraph (a)(2) would address services ("In addition to the sources listed in paragraph (a)(1) of this section, agencies are encouraged to consider Federal Prison Industries, Inc. (see Subpart 8.6)"). The contracts and instruments would not be listed in any order of priority.
  - Paragraph (b) would state that "commercial sources (including educational and non-profit institutions) in the open market" are to be considered after the sources in paragraphs (a)(1) and (a)(2) are considered.

  In addition, paragraph (a)(1) would include a cross-reference to FAR 5.601, Government Database of Contracts, where the Interagency Contract Directory (ICD) website address is provided (**http://www.contractdirectory.gov/contractdirectory/**). The "Interagency Contract Directory (ICD) is a central repository of Indefinite Delivery Vehicles (IDV) awarded by the federal agencies where the IDV is available for use at both the intra agency and interagency levels."

Comments on this proposed rule must be submitted no later than May 31, 2011, identified as "FAR Case 2009-024," 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.

■ **Documenting Contractor Performance:** This proposed rule would amend FAR Subpart 42.15, Contractor Performance Information, to provide governmentwide standardized past performance evaluation factors and performance ratings, and to require all past performance information be entered into the Contractor Performance Assessment Reporting System (CPARS), the governmentwide past performance feeder system (**http://www.cpars.gov/**).

The proposed FAR revisions would include the following:

– FAR 42.1501, General [on contractor performance information], would be revised to provide that all past performance information shall be entered into CPARS, the feeder system into the Past Performance Information Retrieval System (PPIRS) (**http://www.ppirs.gov/**).

- The last sentence in paragraph (a) of FAR 42.1502, Policy ("The content of the evaluations should be tailored to the size, content, and complexity of the contractual requirements"), would be moved to paragraph (b)(1) of FAR 42.1503, Procedures.
- FAR 42.1503 would be revised to specify the governmentwide standard evaluation factors (paragraph (b)(2)) and a five scale rating system that reflects the rating definitions contained in the CPARS Policy Guide (paragraph (b)(4)). Also, incentive-fee and award-fee contract performance ratings are to be entered into CPARS (paragraphs (c)(1) and (c)(2), respectively).

Comments on this proposed rule must be submitted no later than August 29, 2011, identified as "FAR Case 2009-042," 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.

GAO RULES LIMITS ON IDIQ PROTESTS HAVE EXPIRED

The Government Accountability Office (GAO) has ruled that the expiration of its authority to hear protests concerning task or delivery orders under indefinite-delivery/indefinite-quantity (IDIQ) contracts that exceed $10,000,000 now allows it to hear all protests against orders under IDIQ contracts (**B-405130, *Technatomy Corporation***, June 14, 2011).

Technatomy Corporation protested the Defense Information Systems Agency (DISA) award of a task order exceeding $10,000,000 under an IDIQ contract issued by the General Services Administration (GSA) on the grounds that DISA unreasonably evaluated vendors' technical and cost quotations. DISA argued that GAO's jurisdiction to hear protests concerning task orders under IDIQ contracts valued in excess of $10,000,000 was authorized under 41 U.S. Code 253j(e)(1), but that this authority expired on May 27, 2011, when a sunset provision in Section 253j(e)(3) took effect. [**NOTE:** On January 4, 2011, Title 41 of the U.S. Code was recodified, and 41 U.S.C. 253j(e) was recodified as 41 U.S.C. 4106(f). For the sake of clarity, the GAO ruling refers to 41 U.S.C. 253j(e) throughout its decision.]

To understand GAO's ruling, a bit of history is necessary:

The Competition in Contracting Act of 1984 (CICA) established GAO's statutory authority to hear protests concerning challenges to the terms of solicitations and the award or proposed award of contracts. CICA did not distinguish between protests of contract awards and protests of task or delivery orders.

In 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which amended CICA by limiting the jurisdiction of GAO to hear protests of task or delivery orders placed under IDIQ contracts under both Title 10 and Title 41 of the U.S. Code (Title 10 applies to the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard; Title 41 applies to all other departments and agencies). FASA's bar on protests of orders applicable to IDIQ contracts under Title 41 (41 U.S.C. 253j(e)), which applies to orders against GSA IDIQ contracts, reads as follows:

A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.

In 2008, Congress modified FASA's bar on protests of task or delivery orders with the passage of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181). Section 843(b) of Public Law 110-181 directs that the following be substituted for 41 U.S.C. 253j(e):

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

Essentially, Section 843(b) of Public Law 110-181 expanded GAO's jurisdiction to hear protests of task and delivery orders in excess of $10,000,000. The expiration for this provision was May 27, 2011 – three years plus 120 days after enactment of Public Law 110-181 (January 29, 2008).

GAO rules that the sunset provision applies to the entire 41 U.S.C. 253j(e), not just the expansion of GAO's jurisdiction by Section 843(b) of Public Law 110-181. By placing an expiration date on "this subsection," GAO's jurisdiction reverts to that in CICA, which places no restrictions on GAO's authority to hear protests concerning any task or delivery orders. "In sum, the plain meaning of 41 U.S.C. § 253j(e)(3) eliminates any bar to our jurisdiction to hear and issue decisions concerning bid protests arising from task or delivery orders of any value. For this reason, we conclude that we have jurisdiction over the task order protest here."

NOTE: The expiration date for the similar restriction applicable to DOD, NASA, and the Coast Guard on GAO hearing protests of task and delivery orders exceeding $10,000,000 (10 U.S.C. 2304c(e)) was extended from May 27, 2011, to September 30, 2016, by Section 825 of the National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383) (see the February 2011 ***Federal Contracts Perspective*** article "Defense Authorization Act Enacted"). Therefore, this GAO decision does not apply to DOD, NASA, or the Coast Guard.

NONMANUFACTURER RULE RETRACTION FOR PROPELLANTS

The Small Business Administration (SBA) is proposing to retract the waiver of the nonmanufacturer rule for petroleum base liquid propellants under North American Industry Classification System (NAICS) code 324110, Petroleum Refineries, Product Service Code (PSC) 9130, Liquid Propellants, Petroleum Base, based on information SBA received from the Defense Logistics Agency, Defense Energy Support Center (DESC), Fort Belvoir, VA.

On May 11, 2009, SBA published a Notice of Intent to grant a waiver of the nonmanufacturer rule for petroleum base liquid propellants. SBA invited comments on the proposed waiver, but no comments were received, so SBA finalized the waiver on June 8, 2009 (see the July 2009 ***Federal Contracts Perspective*** article "One Nonmanufacturer Waiver Approved, One Proposed"). However, DESC was not aware of the notice until after the closing date for submission of comments. DESC has awarded prime contracts to, or received offers from, multiple small business refiners, so the waiver should not have been granted.

On August 4, 2009, SBA published a notice of intent to retract the petroleum base liquid propellants waiver, and sought comments (see the September 2009 ***Federal Contracts Perspective*** article "Retraction of Two Nonmanufacturer Waivers Proposed"). Yet a final notice of retraction was never published, so SBA is again proposing to retract the waiver of the nonmanufacturer rule for petroleum base liquid propellants under NAICS code 324110. Comments and source information must be submitted no later than June 20, 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/sites/default/files/class_waiver.pdf**.

GSA IMPLEMENTING IT SECURITY PROVISION

The General Services Administration (GSA) is amending the GSA Acquisition Regulation (GSAR) to add Subpart 539.70, Additional Requirements for Purchases Not in Support of National Security Systems, and a corresponding provision and clause, to implement policy and guidelines for contracts and orders that include information technology (IT) supplies, services and systems with security requirements.

New GSAR Subpart 539.70 requires that employees responsible for or procuring information technology supplies, services, and systems (including contracting officers, contract specialists, project/program managers, and contracting officer representatives) possess the appropriate security clearance associated with the level of security classification related to the acquisition, and that contracting activities coordinate with requiring activities and program officials to ensure the solicitation documents include the appropriate information security requirements. "The information security requirements must be sufficiently detailed to enable service providers to fully understand the information security regulations, mandates, and requirements that they will be subject to under the contract or task order" (paragraph (c) of GSAR 539.7001, Policy). Finally, it requires that the Chief Information Officer's IT Security Procedural Guide 09-48, Security Language for Information Technology Acquisitions Efforts, be inserted in all solicitations and contracts or task orders where an information system is contractor owned and operated on behalf of the federal government (**http://www.gsa.gov/portal/category/25690**).

Both GSAR 552.239-70, Information Technology Security Plan and Security Authorization,

and GSAR 552.239-71, Security Requirements for Unclassified Information Technology Resources, are to be included in solicitations and contracts that include IT supplies, services, or systems in which the contractor will have physical or electronic access to government information that directly supports the mission of GSA:

- GSAR 552.239-70 states, "All offers/bids submitted in response to this solicitation must address the approach for completing the security plan and certification and security authorization requirements as required by the clause at 552.239-71, Security Requirements for Unclassified Information Technology Resources."

- GSAR 552.239-71 makes the contractor "responsible for information technology (IT) security, based on General Services Administration (GSA) risk assessments, for all systems connected to a GSA network or operated by the contractor for GSA, regardless of location. This clause is applicable to all or any part of the contract that includes information technology resources or services in which the contractor has physical or electronic access to GSA's information that directly supports the mission of GSA, as indicated by GSA. The term information technology, as used in this clause, means any equipment, including telecommunications equipment that is used in the automatic acquisition, storage, manipulation, management, control, display, switching, interchange, transmission, or reception of data or information."

  The clause requires the contractor to "develop, provide, implement, and maintain an IT Security Plan. This plan shall describe the processes and procedures that will be followed to ensure appropriate security of IT resources that are developed, processed, or used under this contract…The plan shall meet IT security requirements in accordance with federal and GSA policies and procedures. GSA's Office of the Chief Information Officer issued "CIO IT Security Procedural Guide 09-48, Security Language for Information Technology Acquisitions Efforts," to provide IT security standards, policies and reporting requirements. This document is incorporated by reference in all solicitations and contracts or task orders where an information system is contractor owned and operated on behalf of the federal government. The guide can be accessed at **http://www.gsa.gov/portal/category/25690**. Specific security requirements not specified in CIO IT Security Procedural Guide 09-48…shall be provided by the requiring activity." This plan is to be submitted within 30 calendar days after award to the contracting officer and contracting officer's representative for acceptance.

  In addition, the contractor must develop a continuous monitoring strategy that includes:

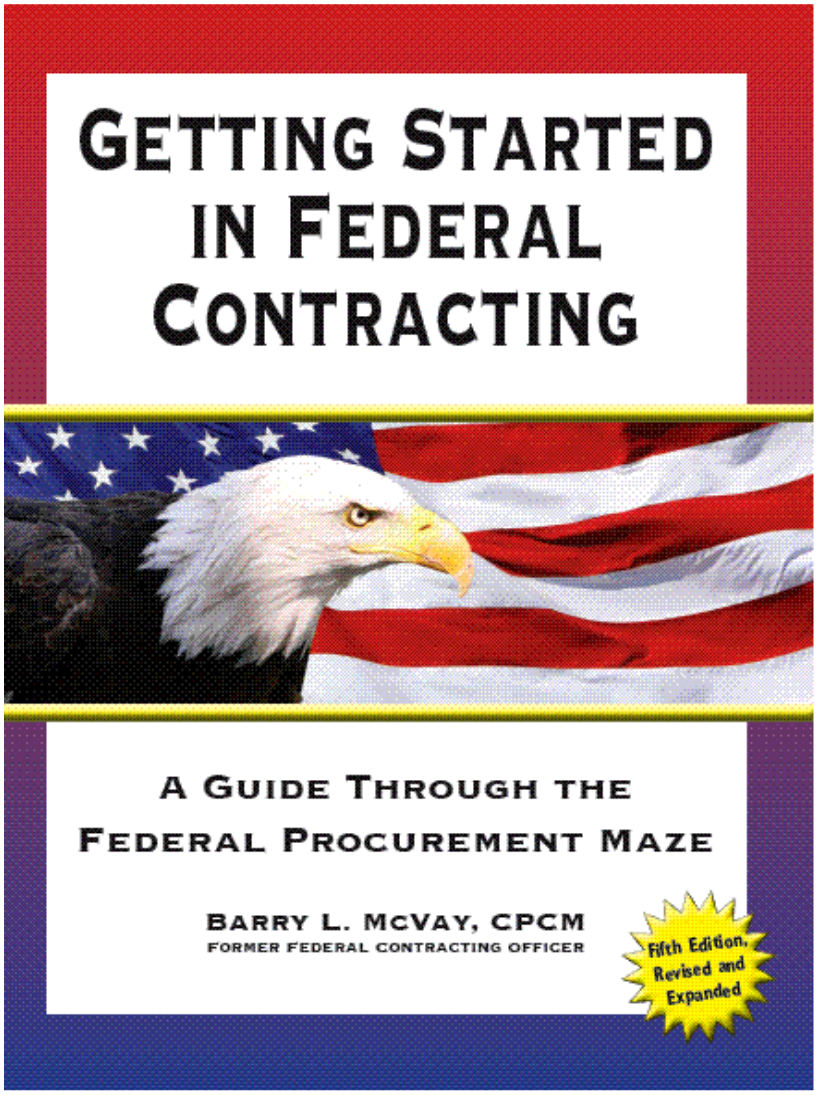
  (1) A configuration management process for the information system and its constituent components;
  (2) A determination of the security impact of changes to the information system and environment of operation;
  (3) Ongoing security control assessments in accordance with the organizational continuous monitoring strategy;
  (4) Reporting the security state of the information system to appropriate GSA officials; and
  (5) All GSA general support systems and applications must implement continuous

monitoring activities in accordance with this guide and NIST SP 800-37 Revision 1, Guide for Applying the Risk Management Framework to Federal Information Systems: A Security Life Cycle Approach.

Within six months after contract award, the contractor must "submit written proof of IT security authorization for acceptance by the contracting officer. Such written proof may be furnished either by the contractor or by a third party. The security authorization must be in accordance with NIST Special Publication 800-37. This security authorization will include a final security plan, risk assessment, security test and evaluation, and disaster recovery plan/continuity of operations plan. This security authorization, when accepted by the contracting officer, shall be incorporated into the contract as a compliance document, and shall include a final security plan, a risk assessment, security test and evaluation, and disaster recovery/continuity of operations plan. The contractor shall comply with the accepted security authorization documentation."

Other requirements include annual verification that the IT Security Plan remains valid, training requirements for the contractor's employees, notification when an employee either begins or terminates employment when the employee has access to GSA information systems or data, and including the clause in subcontracts.

Comments on this interim rule must be submitted no later than August 15, 2011, identified as "GSAR Case 2011-G503," 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.



426 pages, 2009, ISBN: 978-1-912481-26-5, $49.95
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