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FAC 2005-53 EXTENDS PROTESTS OF TASK/DELIVERY ORDERS, STANDARDIZES UNIQUE PIIDS

Federal Acquisition Circular 2005-53 contains six rules that amend the Federal Acquisition Regulation (FAR), among them a rule extending the deadline for protests against task and delivery orders issued by the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and a rule standardizing the use of unique Procurement Instrument Identifiers (PIIDs) throughout the government.

■ **Extension of Sunset Date for Protests of Task and Delivery Orders:** This interim rule amends FAR 16.505, Ordering [under indefinite-quantity contracts], to extend the sunset date for protests against the award of task or delivery

orders exceeding \$10,000,000 by DOD, NASA, and the Coast Guard from May 27, 2011, to September 30, 2016. This is in accordance with Section 825 of the National Defense Authorization Act for Fiscal Year (FY) 2011 (Public Law 111-383), which amends Title 10 of the U.S. Code, Section 2304c(e) (10 U.S.C. 2304c(e)) to extend the sunset date for protests against the award of task and delivery orders from May 27, 2011, to September 30, 2016. However, Title 10 of the U.S. Code only applies to DOD, NASA, and the Coast Guard. There has been no comparable change to Title 41 of the U.S. Code, which applies to all other agencies, so the sunset date for protests against the award of task and delivery orders by other agencies remained May 27, 2011. "With this change, contractors will no longer be able to protest task or delivery orders awarded by agencies other than DOD, NASA, and the Coast Guard," states the introduction to the rule. This statement conflicts with the recent ruling by the Government Accountability Office (GAO) that the expiration of the restriction in 41 U.S.C. 253j(e) (the civilian agencies' equivalent of 10 U.S.C. 2304c(e)) means GAO can hear *any* protests against civilian agencies' task and delivery orders without limit (see the July 2011 *Federal Contracts Perspective* article "GAO Rules Limits on IDIQ Protests Have Expired")!

This disagreement regarding the interpretation of a word or two in a statute is very similar to the recent dispute between the executive branch and the legislative and judicial branches whether the word "shall" in a provision of law the HUBZone program precedence over the 8(a) Business Development program and the Service-Disabled Veteran-Owned Small Business (SDVOSB) program. This disagreement forced Congress to pass a law changing "shall" to "may" to institute parity among the programs (for more on this, see the October 2010 *Federal Contracts Perspective* article "Parity Among Small Business Programs Mandated by Statute").

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■ **Unique Procurement Instrument Identifier:** This finalizes, with changes, the proposed rule that would add FAR Subpart 4.16, Unique Procurement Instrument Identifiers, to standardize use of unique Procurement Instrument Identifiers (PIIDs) throughout the government. “The lack of consistent agency policies and procedures for PIIDs subjected users of contract data, including the federal government, contractors, and the public, to potential duplicate, overlapping, or conflicting information from the different federal agencies,” states the introduction to the rule.

Paragraph (a) of FAR 4.605, Procedures [for contract reporting], requires that “agencies shall have in place a process that ensures that each PIID reported to FPDS [Federal Procurement Data System (<https://www.fpds.gov>)] is unique governmentwide, for all solicitations, contracts, blanket purchase agreements, basic agreements, basic ordering agreements, or orders...and will remain so for at least 20 years from the date of contract award.” However, prior to this rule, there were no specific policies and procedures preventing one agency from using the same identification number for a financial record that another agency uses to identify its contracts in FPDS. Because this duplication of identification numbers would produce duplications, errors, discrepancies, and conflicting information, this rule was considered necessary.

This final rule adds the following:

- FAR 4.001, Definitions, which provides definitions for PIID (“government-unique identifier for each solicitation, contract, agreement, or order”) and supplementary PIID (“the non-unique identifier for a procurement action that is used in conjunction with the government-unique identifier”).
- FAR 4.1601, Policy [for PIIDs], which requires:
 - That agencies submit their proposed identifier format to the General Services Administration's Integrated Acquisition Environment Program Office, which maintains a registry of the agency-unique identifier schemes.
 - The PIID must consist of alpha characters in the first positions to indicate the agency, followed by alpha-numeric characters according to agency procedures.
 - The PIID must be used to identify all solicitation and contract actions.
 - Agencies shall not change the PIID unless continued use of a PIID is not possible or is not in the government’s best interest.
- FAR 4.1602, Identifying the PIID and Supplementary PIID, requires that the PIID be identified in all solicitations, contracts and purchase orders, delivery and task orders, blanket purchase agreements, basic ordering agreements, orders against blanket purchase agreements, orders against basic ordering agreements, orders against Federal Supply Schedules, and modifications to any of these documents. Modifications to any of these documents must contain a supplementary PIID in conjunction with the PIID.

Vivina McVay, Editor-in Chief

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Four respondents submitted comments on the proposed rule and the following change was made to the final rule as a result:

- In FAR 4.605, the definition for PIID was proposed to read “the government-unique identifier for each solicitation, contract, agreement, amendment, modification, or order.” A respondent suggested that the word “amendment” be removed because amendments are not reported to the FPDS. The word “amendment” is removed from the final rule.

For more on the proposed rule, see the September 2010 *Federal Contracts Perspective* article “Rule on Procurement Instrument Identifiers Proposed.”

■ **Equal Opportunity for Veterans:** This finalizes, with changes, the interim rule that revised FAR Subpart 22.13, Equal Opportunity for Veterans (formerly titled “Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans”), to implement Department of Labor (DOL) affirmative action regulations (Title 41 of the Code of Federal Regulations [CFR], 61-300, Annual Report from Federal Contractors). The DOL regulations (1) eliminated Vietnam-era veterans as a separate protected category and expanded coverage to “veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized”; and (2) requires annual reporting using the VETS-100A, Federal Contractor Veterans’ Employment Report, in place of the VETS-100 (see the June 2008 *Federal Contracts Perspective* article “New Regs Address Veterans’ Employment, Ownership”).

The interim rule made the changes to the broad categories of veterans afforded protection and the reporting requirements throughout FAR Subpart 22.13; to FAR 52.222-35, Equal Opportunity for Veterans (formerly “Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans”); and to FAR 52.222-37, Employment Reports on Veterans (formerly “Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans”). One respondent made comments on the interim rule and, as a result, the definition of “executive and senior management” in FAR 52.222-35, Equal Opportunity for Veterans, is added to FAR 22.1301, Definitions. For more on the interim rule, see the October 2010 *Federal Contracts Perspective* article “FAC 2005-46 Exempts Commercial IT from BAA.”

■ **Uniform Suspension and Debarment Requirement:** This finalizes, with changes, the interim rule that implemented Section 815 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84), which extended the flowdown of the restriction on subcontracting to all subcontractors at any tier that have been suspended or debarred. Section 815 provided two exceptions: (1) subcontracts for commercially available off-the-shelf items (COTS); and (2) for commercial items, subcontracts below the first-tier.

To implement Section 815, the following changes were made to the FAR by the interim rule:

- The introduction to paragraph (b) of FAR 9.405-2, Restrictions on Subcontracting, was revised to exclude COTS items from the restrictions on subcontracting with contractors that have been debarred, suspended, or proposed for debarment; and to limit the notification requirement to first-tier subcontracts for acquisitions of commercial items that exceed \$30,000.

- FAR 52.209-6, Protecting the Government’s Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, was amended by adding the definition of COTS items from FAR 2.101, Definitions; and by flowing down the requirements to check whether a subcontractor is suspended or debarred beyond the first-tier, with the stated exceptions for COTS items.
- New subparagraph (b)(6) was added to FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items, to require that the contractor of commercial items be required to comply with FAR 52.209-6 because the requirement that commercial contracts must flow the requirement down to the first-tier is now statutory.
- New subparagraph (b)(2)(i) was added to FAR 52.213-4, Terms and Conditions – Simplified Acquisitions (Other Than Commercial Items), to require that the contractor of commercial items be required to comply with FAR 52.209-6 because the requirement that contracts over \$30,000 must flow the requirement down to all subcontracts is now statutory (\$30,000 is less than the simplified acquisition threshold (\$150,000), which is why this had to be added to the terms and conditions for simplified acquisitions).

Three respondents submitted comments on the interim rule and, as a result, the third sentence of FAR 9.405-2(b) is revised from “If a contractor intends to subcontract...” to “If a contractor intends to enter into a subcontract in excess of \$30,000...” For more on the interim rule, see the January 2011 *Federal Contracts Perspective* article “FAC 2005-47 Revises HUBZone Program, Allows Subcontractor SDB Self-Certification.”

■ **Encouraging Contractor Policies To Ban Text Messaging While Driving:** This finalizes, with changes, the interim rule that implemented Executive Order 13513, Federal Leadership on Reducing Text Messaging While Driving, by adding FAR Subpart 23.11, Encouraging Contractor Policies to Ban Text Messaging While Driving, and a new clause FAR 52.223-18, Encouraging Contractor Policies to Ban Text Messaging While Driving, which encourage contractors to “conduct initiatives in a manner commensurate with the size of the business, such as: (i) establishment of new rules and programs or re-evaluation of existing programs to prohibit text messaging while driving; and (ii) education, awareness, and other outreach to employees about the safety risks associated with texting while driving.”

Based on comments submitted in response to the interim rule, the title of FAR 52.223-18 was changed from “Contractor Policy to Ban Text Messaging While Driving” to “Encouraging Contractor Policies to Ban Text Messaging While Driving,” and in paragraph (c) of the clause “The contractor should...” is changed to “The contractor is encouraged to...” The changes were made because the rule is not mandatory. For more on the interim rule, see the October 2010 *Federal Contracts Perspective* article “FAC 2005-46 Exempts Commercial IT from BAA.”

■ **Truth in Negotiations Act Interest Calculations:** This finalizes, without changes, the proposed rule that would revise FAR 52.214-27, Price Reduction for Defective Certified Cost or Pricing Data – Modifications – Sealed Bidding, FAR 52.215-10, Price Reduction for Defective Certified Cost or Pricing Data, and FAR 52.215-11, Price Reduction for Defective Certified Cost or Pricing Data – Modifications, to require that compound interest calculations be applied to

government overpayments as a result of defective cost or pricing data. These three clauses had specified “simple interest,” but a court case addressed the method of interest calculation on Cost Accounting Standards (CAS) cost impacts and ruled that the pertinent statute, Title 26 of the U.S. Code, Section 6622 (26 U.S.C. 6622), “Interest Compounded Daily” applies under such circumstances (*Robert M. Gates, Secretary of Defense v. Raytheon Company*, CAFC 2008-1543, September 14, 2009).

For more on the proposed rule and the court case, see the October 2010 *Federal Contracts Perspective* article “FAR Rule Would Address T&M/Labor-Hour Contracts.”

CAS APPLICABILITY THRESHOLD CHANGED TO REFLECT TINA

The Cost Accounting Standards Board (CASB) is revising the threshold for the applicability of Cost Accounting Standards (CAS) from “\$650,000” to “the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation.” The change is being made because the CAS applicability threshold is statutorily tied to the TINA threshold, which was recently changed to \$700,000 as required by Section 807 of the National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) (“on October 1 of each year that is evenly divisible by five, the Federal Acquisition Regulatory Council shall adjust each acquisition-related dollar threshold provided by law... to the baseline constant dollar value of that threshold”) (for more on the most recent five-year threshold adjustment, see the September 2010 *Federal Contracts Perspective* article “Federal Acquisition-Related Thresholds Adjusted for Inflation”).

This change obviates the need to revise the CAS regulations to reflect the new TINA threshold every time it is adjusted.

The change from “\$650,000” to “the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation” is being made to the following CAS regulations (which are Chapter 99 of Title 48 of the Code of Federal Regulations):

- Section 9901.306, Standards Applicability
- Paragraph (b)(2) of Section 9903.201-1, CAS Applicability
- Paragraphs (c)(3) and (c)(5) of Section 9903.201-2, Types of CAS Coverage
- Paragraph (a)(2) of Section 9903.201-3, Solicitation Provisions
- In Section 9903.201-4, Contract Clauses:
 - Paragraph (d) of the clause under (a)(2), Cost Accounting Standards
 - Paragraph (d)(2) of the clause under (c)(1), Disclosure and Consistency of Cost Accounting Practices
 - Paragraph (f)(2) of the clause under (e)(2), Cost Accounting Standards – Educational Institutions
- Paragraphs (c)(2), (f)(2)(i), and (f)(3)(i) through (iii) of Section 9903.202-1, General Requirements

Comments on this interim rule must be submitted no later than August 11, 2011, identified as “CAS-TINA Threshold,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: casb2@omb.eop.gov; (3) fax: 202-395-5105; or (4) mail: Office of Federal Procurement Policy, ATTN: Raymond J. M. Wong, 725 17th Street, NW, Room 9013, Washington, DC 20503.

ONE NONMANUFACTURER RULE RETRACTED, ONE DENIED

The Small Business Administration (SBA) is retracting the waiver of the nonmanufacturer rule for petroleum base liquid propellants (NAICS) because of the discovery of small business manufacturers, and denying a request for a waiver of the nonmanufacturer rule for optical eyeglass frames because SBA has discovered a manufacturer.

■ **Petroleum Base Liquid Propellants:** The SBA is retracting 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 (DLA), 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 again proposed to retract the waiver of the nonmanufacturer rule for petroleum base liquid propellants under NAICS code 324110 on June 3, 2011 (see the July 2011 *Federal Contracts Perspective* article “Nonmanufacturer Rule Retraction for Propellants”).

SBA received two responses to this notice, one from DLA, the other from a small business nonmanufacturer. DLA identified seven small business refiners that have been awarded contracts by DLA or submitted offers to DLA, thus participating in the federal market. The small business nonmanufacturer indicated that termination of the waiver would hinder its ability to compete for set-asides but did not provide evidence that small business manufacturers are not available to participate in the federal marketplace. Therefore, SBA is retracting the waiver.

■ **Optical Eyeglass Frames:** The SBA has decided not to waive the nonmanufacturer rule for optical eyeglass frames under the NAICS code 339115, Ophthalmic Goods Manufacturing, PSC 6540, Ophthalmic Instruments, Equipment, and Supplies, because a small business manufacturer indicated that it has furnished this product to the federal government, thus participating in the federal market. The small business manufacturer responded to SBA’s notice of intent to waive the nonmanufacturer rule for optical eyeglass frames (see the May 2011 *Federal Contracts Perspective* article “Eyeglass Frames Nonmanufacturer Rule Waiver Proposed”).

NOTE: 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.

PROMPT PAYMENT INTEREST RATE SET AT 2 1/2%

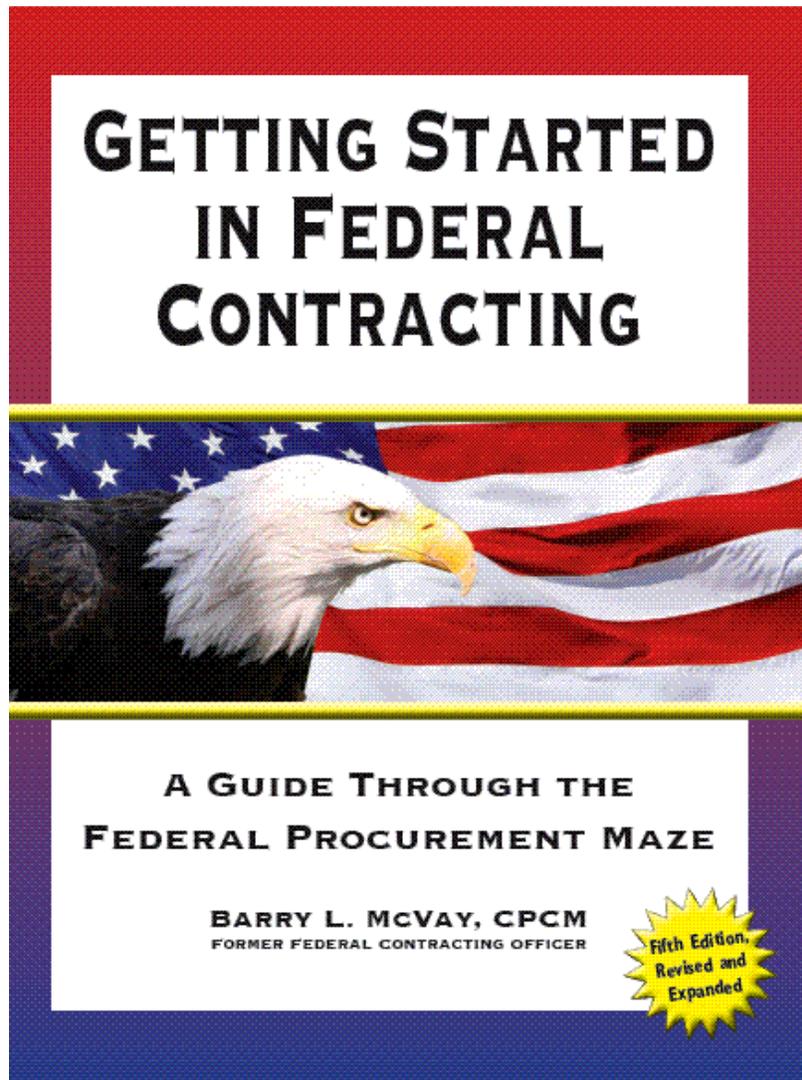
The Treasury Department has established 2 1/2% (2.500%) as the interest rate for the computation of payments made between July 1, 2011, and December 31, 2011, under the Prompt Payment Act and the Contracts Disputes Act. This rate is also used in facilities capital cost of money calculations. The interest rate for the prior six-month period (January 1, 2011, through June 30, 2011) was 2 5/8% (2.625%). The interest rate for July 1, 2010, through December 31, 2010), was 3 1/8% (3.125%).

All prompt payment interest rates since 1980 (in six-month increments) are available at http://www.treasurydirect.gov/govt/rates/tcir/tcir_opdprmt2.htm.

FAR Subpart 32.9, Prompt Payment; FAR Subpart 33.2, Disputes and Appeals; FAR 31.205-10, Cost of Money; and Cost Accounting Standard (CAS) 9904.414, Cost of Money as an Element of the Cost of Facilities Capital, are affected by this interest rate.

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