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DISPLACED SERVICE WORKERS GET RIGHT OF FIRST REFUSAL

The Department of Labor (DOL) has issued regulations to implement Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts, which mandates the inclusion of a contract clause requiring a successor contractor and its subcontractors to offer the employees employed under the predecessor contract the right of first refusal of employment under the successor contract in positions for which they are qualified. These regulations will apply to contracts subject to the Service Contract Act that require performance of the same or similar services at the same location. The regulations will go into effect when the Federal Acquisition Regulation (FAR) is amended, and will apply to covered contracts greater than the simplified acquisition threshold ($150,000). The regulations will become Title 29 of the Code of Federal Regulations, Part 9, Nondisplacement of Qualified Workers Under Service Contracts (29 CFR Part 9).

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The executive order included the text of the contract clause that must be included in solicitations and contracts covered by the order, and that text is included in 29 CFR Part 9, Appendix A. The clause requires the contractor, no later than 10 days before completion of the contract, to furnish the contracting officer a certified list of the names of all service employees working under this contract *and its subcontracts* during the last month of contract performance. The contracting officer will provide the list to the successor contractor, and the list will be provided on request to employees or their representatives.

The successor contractor and subcontractors must offer the employees on the list the right of first refusal of employment in positions for which employees are qualified under the successor contract. "The contractor and its subcontractors shall determine the number of employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work…there shall be no employment opening under this contract, and the contractor and any subcontractors shall not offer employment under this contract, to any person prior to having complied fully with this obligation." The contractor and its subcontractors must make an express offer of employment to each employee and provide at least 10 days for acceptance of the offer.

There are several exceptions to this requirement:

- Offers do not have to be made to managerial and supervisory employees.

- The contractor and its subcontractors may employ any employee who has worked for the contractor or subcontractor for at least three months immediately preceding the commencement of the contract and who would otherwise face lay-off or discharge.

- The contractor and its subcontractors are not required to offer a right of first refusal to any employee of the predecessor contractor whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job.

- A contractor or subcontractor is not required to offer employment to any employee of the predecessor contractor who will be retained by the predecessor contractor.

- The requirements do not apply to contracts or subcontracts awarded under the Javits-Wagner-O'Day Act (see FAR Subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled).

- The requirements do not apply to contracts or subcontracts for guard, elevator operator, messenger, or custodial services provided to the federal government under contracts or subcontracts with sheltered workshops employing the severely handicapped.

- The requirements do not apply to agreements for vending facilities entered into under the preference regulations issued under the Randolph-Sheppard Act (see the Federal Management Regulation (FMR) Sections 102-74.40 to 102-74.75).

- The exclusions pertaining to (1) the Javits-Wagner-O'Day Act; (2) guard, elevator operator, messenger, or custodial services provided to the federal government under contracts or subcontracts with sheltered workshops employing the severely handicapped; and (3) vending facilities under the Randolph-Sheppard Act apply when either the predecessor or successor contract has been awarded for services produced or provided by the severely disabled under those programs.

- The requirements do not apply to employees who were hired to work under a federal service contract and one or more nonfederal service contracts as part of a single job, provided the employees were not deployed in a manner that was designed to avoid the purposes of the executive order.

- The requirements do not apply when the head of a contracting department or agency finds that the application of any of the requirements would not serve the purposes of the executive

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order or would impair the ability of the government to procure services on an economical and efficient basis.

Even with the requirements of the executive order and DOL's implementing regulations, a contractor or subcontractor determines the number of employees necessary for efficient performance of the contract or subcontract and may decide to employ fewer employees than the predecessor contractor employed to perform the work – the successor contractor need not offer employment on the contract to all employees on the predecessor contract, but must offer employment only to the number of eligible employees the successor contractor believes necessary to meet its anticipated staffing pattern (there are exceptions, of course).

For more on Executive Order 13495, see the March 2009 ***Federal Contracts Perspective*** article "Obama Issues Four Labor-Related Executive Orders."

A FEW MORE CHANGES TO THE DFARS

The Department of Defense (DOD) took a break in August, merely issuing three final rules, one interim rule, and a memorandum encouraging the solicitation of small businesses when acquiring supplies or services from the Federal Supply Schedules.

■ **Nonavailability Exception for Procurement of Hand or Measuring Tools:** This finalizes, with minor changes, the interim rule that amended DFARS 225.7002, Restrictions on Food, Clothing, Fabrics, and Hand or Measuring Tools, to implement Section 847 of the National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383), which provides a nonavailability exception to the requirement at 10 U.S.C. 2533a (the "Berry Amendment") to acquire only domestic hand or measuring tools.

Paragraph (b) of DFARS 225.7002-2, Exceptions, permitted contracting officers to acquire "any of the items in [DFARS] 225.7002-1(a), 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..." However, the items in DFARS 225.7002-1(b), "hand or measuring tools, unless the tools were produced in the United States," were not covered by this exception – only U.S-produced hand or measuring tools could be acquired.

Section 847 removed the prohibition against the Secretary authorizing the purchase of hand or measuring tools not produced in the United States. The interim rule revised the introductory text of DFARS 225.7002-2(b) to change "any of the items in 225.7002-1(a)" to "any of the items in 225.7002-1". By eliminating paragraph "(a)" from "225.7002-1," the nonavailability exception was applied to all the items covered by both DFARS 225.7002-1(a) *and* (b).

One respondent submitted comments on the interim rule, but no changes were made in response to those comments. However, the following administrative changes were made to the final rule:

– DFARS 225.7002-2(c) had provided an exception to the restrictions of the Berry Amendment for acquisitions of items listed in paragraph (a) of FAR 25.104, Nonavailable Articles: "Acquisitions of items listed in FAR 25.104(a), unless the items are hand or measuring tools." Now that domestic nonavailability is an authorized

exception for hand or measuring tools, "unless the items are hand or measuring tools" is removed from DFARS 225.7002-2(c).

– To DFARS 225.7002-1(b) is added language that directs contracting officers to the corresponding site in DFARS Procedures, Guidance, and Information (PGI) for additional guidance on interpretation of the Berry Amendment restriction on foreign acquisition of hand or measuring tools.

For more on the interim rule, see the April 2011 ***Federal Contracts Perspective*** article "An Avalanche of DFARS Changes!"

■ **Identification of Critical Safety Items:** This finalizes, without changes, the proposed rule that would add DFARS 252.209-7010, Critical Safety Items, to identify aviation critical safety items and ship critical safety items so contract administration activities can readily identify such items and apply additional risk-based surveillance to comply with joint agency instructions.

One respondent submitted comments on the proposed rule, but no changes were made in response to those comments, so it is finalized without changes. For more on the proposed rule, see the April 2011 ***Federal Contracts Perspective*** article "An Avalanche of DFARS Changes!"

■ **Government Property:** This finalizes, with changes, the rule that proposed to update and reorganize DFARS Subpart 245.6, Support Government Property Management, to reflect the revisions to FAR Part 45, Government Property, that were made by Federal Acquisition Circular (FAC) 2005-17 (the "FAR Part 45 Rewrite" – see the June 2007 ***Federal Contracts Perspective*** article "FAR Coverage on Government Property Simplified, Clarified, Trimmed").

The proposed rule would change the title of DFARS Subpart 245.6 to "Reporting, Reutilization, and Disposal" and revise it; relocate DFARS Subpart 245.70, Appointment of Property Administrators and Plant Clearance Officers, to DFARS 201.670, Appointment of Property Administrators and Plant Clearance Officers; redesignate DFARS Subpart 245.71 as DFARS Subpart 245.70, Plant Clearance Forms; relocate DFARS Subpart 245.72, Special Instructions, to DFARS 245.602-1, Inventory Disposal Schedules, and the DFARS Procedures, Guidance, and Information (PGI); and relocate DFARS Subpart 245.73, Sale of Surplus Contractor Inventory, to DFARS 245.604-3, Sale of Surplus Property.

Three respondents submitted comments on the proposed rule, and several clarifying changes were made. For more on the proposed rule, see the January 2011 ***Federal Contracts Perspective*** article "DOD Continues Its Rampage Through the DFARS."

■ **Contractors Performing Private Security Functions:** This interim rule adds DFARS 225.370, Contractors Performing Private Security Functions, and the corresponding clause DFARS 252.225-7039, to establish minimum processes and requirements for the selection, accountability, training, equipping, and conduct of personnel performing private security functions. This implements Section 862 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Public Law 110-181), as amended by Section 853 of the NDAA for FY 2009 (Public Law 110-417) and Sections 831 and 832 of the NDAA for FY 2011 (Public Law 111-383).

An interim final rule was published in 2009 to meet the mandate of Section 862 of the FY 2008 NDAA to provide policy and guidance regulating the actions of DOD and other governmental private security contractors (see the August 2009 ***Federal Contracts Perspective*** article "DOD Establishes Policy on Private Security Contractors"). This interim rule implements the legislation by establishing: (1) regulations addressing the selection, training, equipping, and conduct of personnel performing private security functions in areas of contingency operations, complex contingency operations, or other military operations or exercises that are designated by the combatant commander; (2) a contract clause; and (3) remedies.

The following changes are made by this interim rule:

- DFARS 216.405-2-71, Award Fee Reduction or Denial for Failure to Comply with Requirements Relating to Performance of Private Security Functions, is added. It requires the contracting officer to "include in any award-fee plan a requirement to review contractor compliance with, or violation of, applicable requirements of the contract with regard to the performance of private security functions in an area of contingency operations, complex contingency operations, or other military operations or exercises that are designated by the combatant commander (see [DFARS] 225.370). In evaluating the contractor's performance under a contract that includes the clause at [DFARS] 252.225-7039, Contractors Performing Private Security Functions, the contracting officer shall consider reducing or denying award fees for a period if the contractor fails to comply with the requirements of the clause during such period. The contracting officer's evaluation also shall consider recovering all or part of award fees previously paid for such period."

- DFARS 225.370 is added, which consists of six subsections, and it applies "to contractors that employ private security contractors in areas of contingency operations, complex contingency operations, or other military operations or exercises that are designated by the combatant commander, whether the contract is for the performance of private security functions or other supplies or services" (DFARS 225.370-4, Policy). DFARS 225.370-4(c) lists the requirements that apply to contractors, such as "authorizing and accounting for weapons to be carried by or available to be used by personnel performing private security functions," "registering and identifying armored vehicles, helicopters, and other military vehicles operated by contractors performing private security functions," and "reporting incidents in which (A) a weapon is discharged by personnel performing private security functions; (B) personnel performing private security functions are attacked, killed, or injured; (C) persons are killed or injured or property is destroyed as a result of conduct by contractor personnel; (D) a weapon is discharged against personnel performing private security functions or personnel performing such functions believe a weapon was so discharged; or (E) active, non-lethal countermeasures (other than the discharge of a weapon) are employed by personnel performing private security functions in response to a perceived immediate threat…" DFARS 225.370-5, Remedies, authorizes contracting officers to direct the removal and replacement of contractor personnel who fail to comply with or violate any of the requirements. If the contractor fails to comply with the contracting officer's direction, the contracting officer may terminate the contract for default, and if the failures are significant or repeated, the contracting officer shall refer the contractor to the appropriate suspension and debarment official.

– DFARS 252.225-7039, Contractors Performing Private Security Functions, reiterates the requirements in DFARS 225.370.

Comments on this interim rule must be submitted no later than October 18, 2011, identified as "DFARS Case 2011-D023," 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 to: Defense Acquisition Regulations System, Attn: Meredith Murphy, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Maximizing Small Business Utilization Under Multiple Award Schedule Program:** This memorandum issued by Richard Ginman, Director of Defense Procurement and Acquisition Policy, reminds contracting officers that "although procurements using the Federal Supply Schedule (FSS) do not require the small business reservation, FAR 8.405-5(b) [Small Business] states that ordering activities may consider socio-economic status when identifying contractors for consideration or competition for an award of an order. As part of the Department's efforts to promote the use of small businesses, contracting officers are strongly encouraged to have at least two or more small businesses in the competitive mix when soliciting from the FSS."

COST ACCOUNTING STANDARDS' FOREIGN EXEMPTION REPEALED

The Cost Accounting Standards Board (CASB) has decided to eliminate the exemption from regulations regarding Cost Accounting Standards (CAS) for contracts executed and performed entirely outside the United States, its territories, and possessions. This exemption from CAS was in paragraph (b)(14) of Title 48 of the Code of Federal Regulations (CFR), Section 9903.201-1, CAS Applicability. It exempted from all CAS requirements "contracts and subcontracts to be executed and performed entirely outside the United States, its territories, and possessions." This exemption has been in effect since 1973.

Section 823 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417) required the CASB to (1) review the applicability of CAS to contracts and subcontracts which would be subject to CAS but for the fact that they are executed and performed entirely outside the United States, and (2) determine whether the government would benefit from the application of CAS to such contracts and subcontracts. Therefore, the CASB invited the public to comment and provide information on the exemption (see the May 2009 ***Federal Contracts Perspective*** article "Should Foreign Contracts Be Exempt from CAS?").

The CASB received comments from seven respondents and from the three government organizations, and the CASB concluded that the (b)(14) overseas exemption should be eliminated because (1) there is no accounting basis for the exemption – the place of contract execution and performance is not germane to the fundamental principles and methods used to account for the costs of contract performance, and (2) the volume of affected contractors and subcontractors is relatively small. So the CASB published a notice of proposed rule to eliminate the (b)(14) overseas exemption (see the November 2010 ***Federal Contracts Perspective*** article "Foreign Exemption to CAS Proposed for Removal").

The CASB received comments on the notice of proposed rule from five respondents: a federal agency, a consultant, a public interest group, an industry association, and a trade association. Several of the respondents concurred with the proposed rule, and those who

disagreed did not persuade the CASB to retain the exemption. Consequently, the CASB has removed 9903.201-1(b)(14).

In other CAS-related actions, the following rulemakings have been discontinued by the CASB:

■ Whether the current thresholds in **CAS 403, Allocation of Home Office Expenses to Segments**, that require use of the three factor formula for allocating residual home office expenses require revision. The three factor formula is applied if residual expenses exceed certain percentages for various levels of operating revenue. The operating revenue thresholds at CAS 9904.403-40(c)(2) were promulgated in December 1972 and have not been revised since.

The CASB sought comments on potential revisions (see the March 2008 ***Federal Contracts Perspective*** article "CAS Board Invites Comments on Home Office Expenses"), and three respondents submitted comments.

"After reviewing the comments and regulatory history of CAS 403, the CAS Board believes that it would be prudent to discontinue the review of the CAS 403 three factor formula operating revenue thresholds at this time," writes the CASB in the notice of discontinuation of rulemaking. "No evidence has been presented to the Board that the current thresholds are creating an inequity, or that adjusting the thresholds would substantially change the outcome, *i.e.*, the pool of contractors required to use the three factor formula to allocate residual home office expenses to the segments would not change significantly. The Board will revisit the issue in the future if circumstances warrant doing so."

■ Whether the word "catastrophic" in the term "catastrophic losses" should be replaced with a term such as "significant" or "very large" in **CAS 416, Accounting for Insurance Costs**.

"After reviewing the history of the CAS rules, the Board believes use of the term 'catastrophic losses' in CAS 416 is consistent with the intent of its original promulgators that a 'catastrophic loss' is 'very large in relation to the average loss per occurrence for that exposure,' is 'expected to occur infrequently,' and is dependent 'on the individual circumstances of each contractor,'" writes the CASB in the notice of discontinuation of rulemaking. "The original promulgators intended the definition of what constitutes a 'catastrophic loss' be part of the contractor's cost accounting practice where the determination of what constitutes a catastrophic loss 'should be made at the time the internal loss-sharing policy is established and should be revised, as necessary, for changes in future circumstances.'

"Although CAS 416 has been in effect for over 30 years, [there are] no data on problems or disputes related to the meaning of the term 'catastrophic losses.' At this time, the Board believes that no amendments to CAS 416 regarding the use of the term 'catastrophic losses' are necessary and is hereby discontinuing further rulemaking in this case."

NFS AWARD FEE LANGUAGE REVISION FINALIZED

The National Aeronautics and Space Administration (NASA) is finalizing, without changes, the interim rule that revised NASA FAR Supplement (NFS) Subpart 1816.4, Incentive Contracts, to bring it into conformance with the changes made to the FAR by Federal Acquisition Circular (FAC) 2005-46.

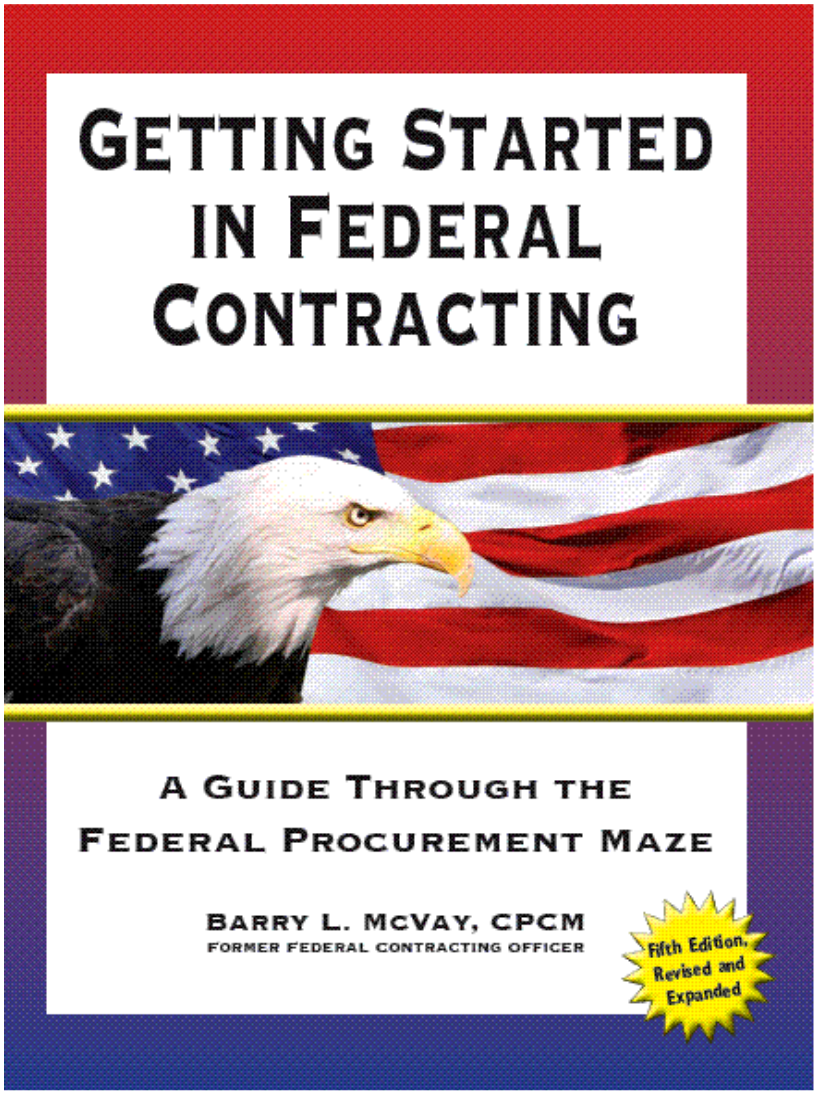
FAC 2005-46 revised FAR 16.305, Cost-Plus-Award-Fee Contracts, FAR 16.401, General [for Incentive Contracts], and FAR 16.405-2, Cost-Plus-Award-Fee Contracts, to incorporate new requirements on the use of award fee incentives as directed by Section 814 of the Fiscal Year (FY) 2007 National Defense Authorization Act (Public Law 109-364) and Section 867 of the FY 2009 National Defense Authorization Act (Public Law 110-417). These revisions in the FAR award fee guidance resulted in the need to make associated changes to the NFS award fee regulations. These changes were made by an interim rule (see the March 2011 ***Federal Contracts Perspective*** article "NFS Implements FAR Award Fee Revision"). No comments on the interim rule were submitted, so the interim rule is finalized without changes.

For more on FAC 2005-46, see the October 2010 Federal Contracts Perspective article "FAC 2005-46 Exempts Commercial IT from BAA."

CHANGES TO DIAR FINALIZED

The Department of the Interior (DOI) is finalizing changes it proposed to the DOI Acquisition Regulation (DIAR) to make it consistent with the FAR; to update references to other federal and departmental directives; to remove obsolete material and references; and to add DIAR 1452.201-70, Authorities and Delegations, which would notify contractors of their roles and responsibilities in complying with technical direction given by authorized representatives of the contracting officer.

No comments were received in response to the proposed rule, so it is finalized without changes. For more on the proposed rule, see the April 2011 ***Federal Contracts Perspective*** article "Changes to DIAR Proposed."



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