

# Government Contracts

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This edition includes Recent Developments and Recent Decisions.

## Recent Developments

**Notification of Potential Safety Issues Under DOD Contracts:** The DOD issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to require contractors to notify the Government of certain potential safety issues. 72 Federal Register (Fed. Reg.) 2633 (Jan. 22, 2007). The rule applies to DOD contracts for the acquisition of (1) repairable or consumable parts identified as critical safety items, (2) systems and subsystems, assemblies, and subassemblies integral to a system, or (3) repair, maintenance, logistics support, or overhaul services for systems and subsystems, assemblies, subassemblies, and parts integral to a system. The rule requires contractors to notify the administrative contracting officer and the procuring contracting officer within 72 hours after discovering or acquiring credible information concerning any (1) nonconformances for parts identified as critical safety items acquired by the Government under covered DOD contracts or (2) nonconformances or deficiencies that may result in a safety impact for systems (or subsystems, assemblies, subassemblies, or parts integral to a system) acquired by or serviced for the Government under covered DOD contracts. This notification requirement is implemented through a new DFARS clause (252.246-7003, Notification of Potential Safety Issues) to be included in covered solicitations, contracts, and subcontracts. Notably, the clause contains a provision stating that notification of safety issues under the clause will be considered neither an admission of responsibility nor a release of liability for the defect or its consequences. The new rule went into effect on January 22, 2007.

**State and Local Government Use of Federal Supply Schedules:** The General Services Administration (GSA) issued an interim rule amending the GSA Acquisition Regulation to authorize state and local Government use of Federal Supply Schedules for the purchase of products and services to facilitate recovery from a major disaster, terrorism, or nuclear, biological, chemical, or radiological attack. 72 Fed. Reg. 4649 (Feb. 1, 2007). The Department of Homeland Security determines which Federal Supply Schedule products and services qualify for state and local Government purchase. Schedule contractors are not required to accept orders placed by state or local Governments. The interim rule went into effect on February 1, 2007. Comments to the rule must be submitted by April 2, 2007.



**Berry Amendment Restrictions:** The DOD issued an interim rule amending the DFARS to expand the foreign source restrictions applicable to the acquisition of clothing. 72 Fed. Reg. 2637 (Jan. 22, 2007). These restrictions now also include clothing materials and components, other than sensors, electronics, or other items added to, and not normally associated with, clothing and the materials and components thereof. The DOD expects the rule to have a positive impact on its clothing contractors, which are mostly small business concerns, by reducing foreign competition. The DOD notes, however, that the rule could have a negative impact on contractors that have been using foreign components in the manufacturing of clothing products. The interim rule went into effect on January 22, 2007. Comments to the rule must be submitted by March 23, 2007.

**Contractor Codes of Ethics and Business Conduct:** A proposed rule was issued amending the Federal Acquisition Regulation (FAR) to add a new section (FAR Subpart 3.10) containing policies and requirements regarding contractor codes of ethics and business conduct. 72 Fed. Reg. 7588 (Feb. 16, 2007). The proposed rule provides that contractors (and subcontractors) receiving awards in excess of \$5 million must within 30 days of award have a written code of ethics and business conduct and, in addition, must within 90 days of award establish an employee ethics and compliance training program and an internal control system proportionate to the size of the company and the extent of its business with the Federal Government. The proposed rule does not apply to commercial item contracts awarded pursuant to FAR Part 12, contracts performed outside the United States, or contracts with performance periods less than 120 days. The proposed rule also contains requirements regarding the workplace display of Office of the Inspector General Fraud Hotline Posters. Penalties for contractor noncompliance with the rule include loss of award fees for noncompliant performance periods. Comments to the rule must be submitted by April 17, 2007.

**Online Representations and Certifications:** The DOD issued a proposed rule amending the DFARS to address DOD-unique requirements relating to the Online Representations and Certifications Application (ORCA). 72 Fed. Reg. 6515 (Feb. 12, 2007). The FAR requires prospective contractors to complete electronic annual representations and certifications in ORCA, in conjunction with required registration in the Central Contractor Registration database. ORCA currently includes only representations and certifications required by the FAR, but is being revised to add those required by the DFARS. The proposed rule lists the existing DFARS representations and certifications that will be included in ORCA. Comments to the proposed rule must be submitted by April 13, 2007.

**Multiple Award Schedule Express Program:** The GSA recently established the Multiple Award Schedule (MAS) Express Program, a new specialized program that is designed to simplify, streamline, and ultimately accelerate the process for vendors to obtain MAS contracts (also know as GSA Schedule and Federal Supply Schedule contracts). Participation in the MAS Express Program is open to all business concerns that meet specific criteria for certain products. Currently, offers accepted under the MAS Express Program are limited to 500 products/line items under five GSA Schedules. The five GSA Schedules are: (1) Schedule 70, "General Purpose Information Technology Equipment, Software, and Services"; (2) Schedule 67, "Photographic Equipment – Cameras, Photographic Printers, and Related Supplies and Services"; (3) Schedule 78, "Sports, Promotional, Outdoor, Recreational, Trophies, and Signs"; (4) Schedule 58, "Professional Audio/Video,

Telecommunications, and Security Solutions”; and (5) Schedule 81, “Shipping, Packaging, and Packing Supplies.” Further details on the MAS Express Program may be found at:

[http://www.gsa.gov/Portal/gsa/ep/contentView.do?programId=10007&channelId=13460&oid=8106&contentId=22292&pageTypeld=8199&contentType=GSA\\_BASIC&programPage=%252Fep%252Fprogram%252FgsaBasic.jsp&P=FX7](http://www.gsa.gov/Portal/gsa/ep/contentView.do?programId=10007&channelId=13460&oid=8106&contentId=22292&pageTypeld=8199&contentType=GSA_BASIC&programPage=%252Fep%252Fprogram%252FgsaBasic.jsp&P=FX7).

**High Risk Federal Programs and Operations:** The U.S. Government Accountability Office (GAO) periodically issues reports to Congress identifying federal programs and operations that are high risk due to their greater vulnerabilities to fraud, waste, abuse, and mismanagement. In its most recent report, issued in January, the GAO identified 27 such areas. High-Risk Series: An Update, GAO-07-310 (Jan. 2007). The GAO removed two areas from the previous list, including (1) U.S. Postal Service transformation efforts and long-term outlook and (2) U.S. Department of Housing and Urban Development single-family mortgage insurance and rental housing assistance programs. The GAO also added three new areas. The first new high risk area involves transportation financing and capacity. The GAO added this area to the list because revenues to support federal transportation funds are eroding at a time when investment is needed to expand capacity to address congestion caused by increasing passenger and freight travel. The second new high risk area involves effective protection of technologies critical to U.S. national security. While technologies that underpin U.S. economic and military strength continue to be targets for theft, espionage, reverse engineering, and illegal export, the GAO found that Government programs established decades ago to protect critical technologies are ill-equipped to weigh competing U.S. interests as the security environment and technological innovation continue to evolve in the 21st century. The third new high risk area involves the fragmented federal oversight of food safety, which the GAO concluded suffers from inconsistent oversight, ineffective coordination, and inefficient use of resources.

## Recent Decisions

**Improper Prequalification:** The GAO sustained a bid protest challenging the award of a Department of State (DOS) contract to design and construct a new embassy compound in eastern Africa because the DOS improperly prequalified the awardee as eligible to compete for the project. Caddell Construction Co., Inc., Comp. Gen. Dec. B-298949, Jan. 10, 2007. Under the Omnibus Diplomatic Security and Antiterrorism Act of 1986, only “United States persons” and “qualified United States joint venture persons” are eligible to compete for certain diplomatic construction projects, including the solicited project. To qualify as a “United States person,” the Act requires, among other things, that an offeror have been incorporated or legally organized in the United States for more than five years before the issuance of the solicitation. To qualify as a “United States joint venture person,” the Act requires that the joint venture have at least one firm or organization that meets all of the requirements for a “United States person.” Because the awardee was only recently incorporated, it did not qualify as a “United States person.” The DOS, however, prequalified the awardee for the project based upon the awardee having a de facto joint venture relationship with its parent company, which the agency determined was a qualified “United States person.” The GAO concluded that this prequalification was improper because, although the awardee indicated that it was relying on the experience of its parent company to prequalify for the work, the awardee specifically certified in its prequalification submission that it was neither a

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formal nor a de facto joint venture. Moreover, the GAO concluded that the DOS had not properly considered whether the awardee's parent corporation satisfied all of the requirements to qualify as a "United States person." Thus, even if the awardee had certified that it was a joint venturer with its parent company, the record did not support a determination that the awardee was a "qualified United States joint venture person" under the Act.

**Simplified Acquisition Procedures:** The GAO determined that the Navy improperly used simplified acquisition procedures in a commercial item procurement for satellite communications systems. *Global Communications, Inc., Comp. Gen. Dec. B-299044 et al., Jan. 29, 2007.* While the applicable FAR provision limited the use of these procedures to purchases at or below \$5 million, the GAO found that the Navy had a reasonable expectation that the anticipated award would exceed \$5 million, which in fact it did. Nothing in the record indicated that the Navy had conducted any market survey or Internet product search to support its view that the required items could be purchased at or below \$5 million. To the contrary, the only documented research, which the Navy performed in connection with a cancelled sole-source award to the awardee, indicated that the agency's estimated value for the procurement exceeded \$5 million. The GAO also stated that a recent regulatory change authorizing an increase in the threshold to \$5.5 million (which apparently would have been met) did not apply to the procurement because, although the change occurred before award, the Navy did not amend the solicitation to incorporate the revision and did not allow offerors to submit revised proposals in response. The GAO further concluded that the Navy's improper use of simplified acquisition procedures was prejudicial to the protester because, unlike the awardee, the protester reasonably viewed the \$5 million threshold as a ceiling on its quotation and, had it been permitted to propose a higher price, it may have offered enhanced features to its product, which could have resulted in its selection for award in this best value procurement.

**Compliance with Solicitation Requirements:** The GAO concluded that the Department of Veterans Affairs (VA) improperly rejected a quotation for a Federal Supply Schedule task order for scanning and archival services because the VA unreasonably determined that the quotation failed to comply with a solicitation requirement that the services be performed at a VA facility in Anchorage, Alaska. *3SG Corp., Comp. Gen. Dec. B-298957, Jan. 5, 2007.* The GAO noted that the quotation began with the unequivocal statement that the services would be performed at the VA facility. Although the VA's concern arose principally from the quotation's references to "sending" and "transferring" documents and other items between the agency and the contractor, the GAO disagreed with the VA that this meant that the materials would be sent off site. In that regard, the GAO observed that the contractor's performance of the work at the VA facility necessarily required that the documents and other materials be transferred from the VA's custody to the contractor for scanning. The GAO therefore sustained the rejected offeror's bid protest. Because there were only two offerors, and because the protester submitted the lowest proposed price, the GAO recommended that the VA terminate the order placed with the awardee and instead issue the order to the protester, if otherwise appropriate.

**Small Business Set Asides:** The GAO sustained a bid protest regarding the award of a National Oceanic and Atmospheric Administration (NOAA) purchase order for an autonomous underwater vehicle because the purchase order was set aside for small business concerns and the agency should have known that the awardee

was ineligible for award as a small business. Hydroid LLC, Comp. Gen. Dec. B-299072, Jan. 31, 2007. In order to qualify as a small business eligible to provide manufactured products under a small business set aside, an offeror must either be a small business manufacturer of the end item being procured, or provide the product of another domestic small business manufacturing or processing concern. This “nonmanufacturer rule” may be waived by the Small Business Administration (SBA) in certain circumstances, such as where the SBA has determined that there are no small business manufacturers or processors in the federal market for a specific product or class of products. Here, the awardee, a small business, submitted a quotation that offered a vehicle manufactured by a large business. There also was no applicable SBA waiver of the nonmanufacturer rule, although NOAA may have mistakenly believed that a waiver did apply. In addition, in response to a size protest challenging the award, the SBA determined that the awardee was not a small business eligible for award because its quotation offered an item manufactured by a large business. The GAO therefore recommended that NOAA cancel the purchase order and award it to an eligible small business offeror.

**Nonconforming Proposals:** The U.S. Court of Federal Claims (COFC) dismissed a bid protest challenging the award of a Federal Bureau of Prisons contract for a residential Comprehensive Sanctions Center and associated services because the protester submitted a final proposal revision that did not conform to the solicitation’s requirements and, therefore, was ineligible for award. *Dismas Charities, Inc. v. United States*, No. 06-825C (Fed. Cl. Feb. 7, 2007). While the solicitation required a 120-day start-up period, the protester, citing concerns about the effects of recent hurricanes on construction in the performance area, proposed a 240-day start-up period. Although the agency failed to note this nonconformance when evaluating the protester’s proposal and, therefore, did not remove it from consideration, the COFC stated that this oversight did not excuse the protester’s failure to meet the solicitation’s start-up requirement.

**Award Fee Determinations:** The COFC held that the Department of Energy (DOE) breached a contract for the management and operation of the Rocky Flats Nuclear Weapons Plant because the contractor’s award fees for two periods were not determined by the contractually designated Government official. *The Boeing Company v. United States*, No. 91-1362C (Fed. Cl. Jan. 17, 2007). While the contract required that the amount of award fees be determined by the Award Fee Determination Official (designated as the Manager of the DOE’s Albuquerque Operations Office), the award fees that the contractor received for the two six-month periods in 1989 were instead mandated by the Secretary of Energy or other personnel at DOE’s headquarters in Washington, DC. The COFC stated that the DOE was bound by the award fee determinations of the designated Award Fee Determination Official. As a result, the COFC awarded the contractor \$3.1 million in damages, calculated as the difference between the award fees determined by the Award Fee Determination Official (\$7.4 million) and the award fees that the DOE actually provided to the contractor (\$4.3 million).

**Civilian Board of Contract Appeals Precedent:** Effective January 6, 2007, most boards of contract appeals in the civilian agencies were consolidated into a single, new Civilian Board of Contract Appeals (CBCA). In its first decision addressing a Contract Disputes Act appeal, the CBCA announced that the holdings of the Court of Appeals for the Federal Circuit and the holdings of “all our predecessor boards” shall be binding as precedent in the CBCA. *Business Management Research Associates, Inc. v. General Services Administration*, CBCA No. 464, Jan. 18, 2007. The CBCA’s decisions are published on its website at <http://www.cbca.gsa.gov/>.

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